No. 87-6796-CSY
Status: GRANTED
CAPITAL CASE

Title: James A. Ford, Petitioner
v.
Georgia

Docketed:
April 15, 1988

Court: Supreme Court of Georgia

Counsel for petitioner: Stevenson,Bryan A.

See also:
89-6431

Counsel for respondent: Smith,Paula K.

Entry	Date	Note	Proceedings and Orders
1	Apr 15 1988	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 18 1988		Brief of respondent Georgia in opposition filed.
4	May 25 1988		DISTRIBUTED. June 9, 1988
5	Feb 21 1989		REDISTRIBUTED. February 24, 1989
6	Feb 2 1990		REDISTRIBUTED. February 16, 1990
8	Feb 20 1990		REDISTRIBUTED. February 23, 1990
9	Feb 21 1990		Record requested.
10	Mar 30 1990		Record filed.
		*	6 vol., received from Georgia Supreme Court
11	Apr 5 1990		REDISTRIBUTED. April 20, 1990
13	Apr 23 1990		Petition GRANTED. limited to Questions 1 and 3 presented by the petition.
			**********
15	May 10 1990		Order extending time to file brief of petitioner on the merits until June 22, 1990.
16	Jul 22 1990		Joint appendix filed.
17	Jul 22 1990		Brief of petitioner James A. Ford filed.
18	Jul 31 1990		Brief of respondent Georgia filed.
19	Aug 28 1990		CIRCULATED.
20	Sep 26 1990		SET FOR ARGUMENT TUESDAY, NOVEMBER 6, 1990. (1ST CASE)
21	Nov 6 1990		ARGUED.

87-6796

ORIG...

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. FORD,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. FORD,
Petitioner,
vs.
STATE OF GEORGIA,
Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner James Arthur Ford prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

OPINION BELOW

Final rehearing denial on the judgment of the Georgia Supreme Court was rendered on February 15, 1987, and is attached as Appendix A hereto. Rehearing was initially denied on December 16, 1987 but was vacated because no notice was given to Petitioner's counsel about rehearing denial. The opinion of the Georgia Supreme Court following remand from this Court was rendered November 30, 1987, reported at 257 Ga. 661, 362 S.E.2d 764 (Ga. 1987), and is attached as Appendix B hereto. This Court's grant of certiorari and remand back to the Georgia Supreme Court was announced on February 23, 1987, reported at 479 U.S. ___, 94 L.Ed.2d 129 (1987), and is attached as Appendix C. The Georgia Supreme Court opinion which formed the basis of Petitioner's first petition for certiorari is reported at 335 S.E.2d 567 (1985), and is attached as Appendix E.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

The Fourteenth Amendment provides:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor shall any state deprive any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . .

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner is a black man confronting death by electrocution following his conviction for murder of a white storeowner and the imposition of a death sentence by an all-white jury. Prior to Petitioner's trial, a motion was filed requesting that the Prosecutor be prohibited from using peremptory challenges in a racially biased manner. (C.R. 49-50). At the pre-trial hearing on Petitioner's motion, defense counsel "stated in his place" that there is a history and pattern of prosecutors using peremptories to strike blacks in cases involving black defendants. (R. 160-

"(C.R. ___)" refers to the Court Clerk's record.
"(PT.R. ___)" refers to the pre-trial record transcripts.
"(R. ___)" refers to the trial record transcripts.

161). Defense counsel requested that the trial court "require the district attorney, if he does use his peremptory challenges to excuse potential black jurors, to justify on the record the reason for excusing them." (R. 160-161). The trial court, relying on the evidentiary standards set out in Swain v. Alabama, 380 U.S. 202, (1965), denied this request. (R. 162).

The prosecutor subsequently used peremptory challenges to strike nine out of ten black jurors resulting in an all-white jury to determine Petitioner's guilt or innocence and whether he lives or dies. At trial, the trial judge again relying on Swain noted that not all blacks had been struck in Mr. Ford's case and therefore refused to require the prosecutor to give explanation for his exercise of peremptory strikes. (R. 267-268). At a motion for new trial and on direct appeal to the Georgia Supreme Court, Petitioner maintained that his Sixth and Fourteenth Amendment rights had been violated by the prosecutor's racially discriminatory exercise of peremptories and the trial court's refusal to require the prosecutor to give reasons for his racially biased use of peremptories. (See Petitioner's Brief on Direct Appeal to the Georgia Supreme Court attached as Appendix F). The Georgia Supreme Court ruling on the merits of Petitioner's claim, rejected his arguments stating that Petitioner had failed to "establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." Ford, 335 S.E.2d at 572.

After filing a petition for writ of certiorari to the Georgia Supreme Court on this issue, this Court last term granted Mr. Ford's petition and remanded his case to the Georgia Supreme Court with instructions to reconsider Petitioner's constitutional challenge to the prosecutor's racially discriminatory use of peremptories in light of Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d. 649 (1987), which made Batson v. Kentucky, 476 U.S. 76, 90 L.Ed.2d 69 (1986) retroactive to all cases pending on direct

review. Ford v. State, 479 U.S. ___, 94 L.Ed.2d 129 (1987).

On remand the Georgia Supreme Court concluded that Petitioner's trial and direct appeal challenge to the prosecutor's racially discriminatory exercise of peremptory strikes as violative of the Sixth and Fourteenth Amendments was a substantively distinct claim under "Swain" and thus not reviewable as ordered by this Court under "Batson". Ford, 362 S.E.2d at 766. The Georgia Supreme Court additionally defined new state procedural requirements on preserving a "Batson" claim for review, unannounced and unknown at the time of Petitioner's trial, which bars retroactive application of the Batson rule. Justice Gregory and Justice Hunt in dissent. (See Appendix B).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner, upon review of the Georgia Supreme Court's opinion following remand from this Court, timely filed a motion for rehearing on December 10, 1987, in the Georgia Supreme Court. (See Appendix D). Petitioner argued that the Georgia Supreme Court's decision is not in compliance with this Court's remand order; that Batson and Swain are not different constitutional claims; that an adequate objection was made at trial to the prosecutor's racially biased use of peremptories, and that the application of a previously unannounced state objection procedure is illegitimate and violates Petitioner's right to due process. (See Petitioner's Motion for Rehearing, Appendix D).

REASONS FOR GRANTING THE WRIT

The Georgia Supreme Court's refusal to reconsider Petitioner's case in light of Griffith v. Kentucky, fails to comply with this Court's mandate and instructions issued in Ford v. Georgia, 479 U.S. ___, 94 L.Ed.2d 129 (1987). This Court's earlier grant of certiorari in Petitioner's case and remand for further consideration in light of Griffith v. Kentucky, was predicated on the fact that Petitioner's challenge to the prosecutor's use of peremptory challenges against black jurors asserted a substantial federal question under the Equal Protection Clause of the Fourteenth Amendment. This Court's mandate contemplated that Georgia would consider whether, as a matter of federal law, petitioner's case could stand in light of the retroactive application of Batson v. Kentucky, 476 U.S. 79 (1986). Since the state court failed to follow this Court's order and did not decide that question this Court should now do so. See e.g., Yates v. Aiken, 484 U.S. ___, 98 L.Ed.2d 546 (1988)(Court grants certiorari following the South Carolina Supreme Court's failure to comply with Court's mandate to reconsider Yate's case in light of Francis v. Franklin, 471 U.S. 307 (1985)).[1]

The Georgia Supreme Court's refusal to follow the mandate of this Court is based on at least two egregious misreadings of the law. The first of these is the state court's erroneous belief that Swain v. Alabama, 380 U.S. 202 (1965) and Batson define different substantive claims under the Equal Protection Clause of the Fourteenth Amendment, thus making Petitioner's challenges at

1. Petitioner would respectfully note that this Court has made summary decisions in cases granted certiorari with increasing frequency. The Georgia Supreme Court's failure to follow this Court's remand Order unquestionably undermines this Court's policy to expeditiously resolve some cases through summary practice and should not be tolerated. The Georgia Supreme Court issued its opinion following this Court's remand without briefing or argument from the parties on the application of Batson to Petitioner's case.

trial to the prosecutor's use of peremptory strikes inadequate to preserve a Batson claim. The second is the state court's view that a previously unannounced objection procedure can be invoked to procedurally bar retroactive application of this Court's decision in Batson as prescribed in Griffith.

1. Batson and Swain Do Not Define Different Constitutional Claims Under the Equal Protection Clause of the Fourteenth Amendment.

By concluding that "Ford's motion under Swain, having been decided against him on appeal, cannot be reviewed in this proceeding", the Georgia Supreme Court has effectively held that Swain and Batson define different constitutional claims under the Equal Protection Clause of the Fourteenth Amendment. The state court's conclusion is in direct conflict with this Court's decision in Batson and Swain and fails to follow this Court's mandate and remand order.[2]

Claims under Batson and Swain are identical in that they challenge racially discriminatory use of peremptories as being violative of the Equal Protection Clause. Batson simply changes the evidentiary standard by which the merits of the same claim are to be determined. In Batson this Court was required to reexamine the "evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." Batson, 90 L.Ed.2d at 77. After undertaking this examination, the Court held that with regard to use of peremptory challenges in a criminal trial, "a consistent pattern of racial discrimination is not a necessary predicate to

2. Petitioner would also note that the Georgia Supreme Court wrote in its November 30, 1987 opinion, the "Supreme court of the United States vacated its grant of Ford's petition for certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded to the Supreme Court of Georgia for further consideration in light of Griffith v. Kentucky, supra." Ford, 362 S.E.2d at 764. The state court however misconstrues the action of this Court. On February 23, 1987, this Court granted certiorari and vacated the judgment of the Georgia Supreme Court. Ford, 94 L.Ed.2d at 129.

a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." Batson, at 87, citing, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977).

As stated by Justice White in his concurrence, Batson overturned the principal holding in Swain [citations omitted], that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons." Batson, at 90.

It is precisely this now overturned Swain holding that the trial court relied on in rejecting Petitioner's challenge at trial. In rejecting Petitioner's claim at trial, the trial court determined that not all blacks had been struck at Petitioner's trial and that not all black jurors had been peremptorily struck by the prosecutor in other cases involving black defendants. (PT.R. 162). Similarly, the Georgia Supreme Court on appeal, relying on Swain, concluded tnat Petitioner had failed to "establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." Ford, 335 S.E.2d at 572.

Because of the incorrect analysis applied by the Georgia courts, this Court remanded with instruction to apply the new Batson standard made retroactive in Griffith. The state court's refusal to do so upon specific instruction from this Court makes necessary the grant of certiorari in Petitioner's case.

2. Petitioner's Fourteenth Amendment Challenge to the Prosecutor's Racially Discriminatory Use of Peremptories is Not Procedurally Barred.

Petitioner clearly presented his claim that his Fourteenth Amendment rights were being violated by the prosecutor's racially

discriminatory use of peremptories. He first filed a pre-trial "Motion to Restrict Racial Use of Peremptory Challenges". Before jury selection began, trial counsel specifically requested that the prosecutor be required to give reasons if peremptories were exercised against black jurors. (PT.R. 160-61). The trial court refused to require the prosecutor to give any reasons for peremptories employed against blacks. (PT.R. 162).

At the trial defense counsel made clear that during jury selection which is untranscribed, the prosecution used nine out of ten peremptories to strike nine out of the ten black jurors in the venire. Again, the trial court made clear its position that no violation of the Sixth or Fourteenth Amendment could be made out on these facts. (R. 267-68). At motion for new trial and on appeal to the Georgia Supreme Court the claim was presented as a violation of Petitioner's Sixth and Fourteenth Amendment rights.

At several occasions pre-trial, during the trial, after the trial and on appeal, Petitioner tried to get the Georgia state courts to do what this Court now requires it to do: not presume that the prosecutor's racially disparate exercise of peremptories against blacks is legitimate and make the prosecutor give reasons for his seemingly racially discriminatory acts.

Petitioner gave the state courts every opportunity to remedy the error alleged in this case and on each occasion the state courts declined to do so. Prior to this Court's remand the state courts did not act unreasonably under existing law, but the law has changed and a showing must now be made on the prosecutor's use of peremptories.

3. The State of Georgia Can Not Invoke an Expressly Prospective State Objection Procedure Unannounced and Unknown at the The Time of Petitioner's Trial to Bar Retroactive Application of Batson.

Despite the fact that at every instance that the state courts reviewed Petitioner's claim prior to this Court's remand the claim was addressed on the merits, the Georgia Supreme Court has now held that Petitioner's claim is procedurally defaulted.

The state court relies on a procedural rule articulated for the first time in State v. Sparks, 355 S.E.2d 658 (Ga. 1987). However, the rule announced in Sparks was an expressly prospective one: "[H]ereafter, any claim under Batson should be raised prior to the time the jurors selected to try the case are sworn." Sparks, 355 S.E.2d at 659, (emphasis added).

Notwithstanding the fact that defense counsel in this case had objected to the prosecutor's racially discriminatory use of peremptories and requested that the prosecutor give reasons for his strikes before the jury was sworn, the application of this rule to Petitioner's case is in direct conflict with the constitutional requirement that a state procedural rule must be "clearly announced to defendant and counsel" to be legitimate and binding. Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965). This Court has made it clear that there can be no procedural bar to implementation of federal constitutional rights unless the procedural rule is a "firmly established and regularly followed state practice". James v. Kentucky, 466 U.S. 341 (1984); Hathorn v. Lovorn, 457 U.S. 255, 262-263 (1982).

The state rule in Sparks concerning the timing of a Batson challenge was not announced until May 19, 1987, and is on its face an expressly prospective one. The state court's application of the rule to Petitioner's capital case which took place some two years earlier is merely a refusal on the part of the state court to meet the clear mandate of this Court. This Court should therefore grant certiorari and address this manifestly unjust result.

4. Petitioner's Case Presents An Important Question Concerning the Application of the Sixth Amendment's Fair Cross-Section Requirement to the Discriminatory Use of Peremptories Against Trial Jurors.

On March 7, 1988, this Court granted certiorari in Teague v. Lane, No. 87-5259, 42 Cr.L. 4197 (1988), which presents the question of whether the Sixth Amendment fair cross-section requirement prohibits the prosecution's racially discriminatory use of the peremptory challenge. In addition to the violation of Petitioner's Fourteenth Amendment rights, Petitioner contends that the prosecutor's use of nine out of ten peremptory strikes against blacks resulting in an all-white jury violated his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community. This issue, rejected by the state courts in Petitioner's case, was expressly left undecided by this Court in Batson v. Kentucky, 106 S.Ct. 1712, 1716 n. 4 (1986), and is presently before the Court in Teague v. Lane.

Because Petitioner's case presents the identical issue, this Court should grant certiorari and review Petitioner's case under this Court's holdings in Batson and under a Sixth Amendment fair cross-section analysis.

CONCLUSION

This Court should grant this petition for writ of certiorari to the Supreme Court of Georgia.

Respectfully submitted,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. FORD,
Petitioner,
vs.
STATE OF GEORGIA,
Respondent,

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, JAMES A. FORD who is now held on death row at the Georgia Diagnostic and Classification Center in Jackson, Georgia asks leave to file the accompanying Petition for a Writ of Certiorari without prepayment of cots and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

Petitioner submits the accompanying affidavit in support of his motion and further submits that he was granted leave to proceed in forma pauperis in the courts below, on trial and appeal due to his indigency.

Supreme Court, U.S.
FILED
APR 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. FORD,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent,

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA
APPENDIX

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QUESTIONS PRESENTED

1. MAY GEORGIA AVOID COMPLIANCE WITH THIS COURT'S REMAND ORDER REQUIRING RECONSIDERATION OF PETITIONER'S CASE IN LIGHT OF GRIFFITH v. KENTUCKY BY DECLARING THAT A PRE-BATSON CHALLENGE UNDER THE FOURTEENTH AMENDMENT TO A PROSECUTOR'S RACIALLY DISCRIMINATORY USE OF PEREMPTORIES IS A DIFFERENT CONSTITUTIONAL CLAIM UNDER "SWAIN"?

2. MAY RETROACTIVE APPLICATION OF THE NEW CONSTITUTIONAL RULE ANNOUNCED IN BATSON, ESTABLISHED IN GRIFFITH, BE VOIDED BY INVOKING A PREVIOUSLY UNANNOUNCED STATE OBJECTION PROCEDURE AS A PROCEDURAL BAR?

3. DOES THE SIXTH AMENDMENT FAIR CROSS-SECTION REQUIREMENT PROHIBIT THE PROSECUTOR'S RACIALLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES IN THE SELECTION OF JURORS?

SUPREME COURT OF GEORGIA

ATLANTA February 15, 1988

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JAMES A. FORD, JR. v. THE STATE

In view of the Motion for Reentry of Judgment Deniying Rehearing filed in this case, it is hereby ordered that the September 1987 Term is extended for the sole purpose of vacating this Court's December 16, 1987, order denying reconsideration in this case and entering such an order this date, which is hereby done.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

FORD
v.
The STATE.
No. 42154.

Supreme Court of Georgia.
Nov. 30, 1987.

Defendant was convicted in the Coweta Superior Court, William F. Lee, Jr., J., of armed robbery, rape, kidnapping with bodily injury, burglary and murder, and was sentenced to death, and he appealed. The Supreme Court, 255 S.E.2d 567, affirmed, and defendant petitioned for writ of certiorari. The United States Supreme Court, 107 S.Ct. 1268, vacated and remanded. On remand, the Supreme Court, Smith, J., held that: (1) any *Batson*-type objection to prosecutor's alleged discriminatory use of peremptory strikes had to be made before jurors were sworn, and (2) defendant's pretrial motion to restrict prosecutor's alleged racial use of peremptory challenges was not contemporaneous objection to composition of jury as selected, so that where no such objection was raised before jurors were sworn, defendant was barred from raising *Batson*-type complaint.

Judgment affirmed upon remand.

Gregory, J., dissented and filed opinion.

Hunt, J., dissented.

1. Jury ⇐136

Prosecutor may not strike black juror solely because of his race, nor upon any assumption based solely upon juror's race. U.S.C.A. Const.Amend. 14.

2. Jury ⇐142

Any *Batson*-type objection to prosecutor's alleged discriminatory use of peremptory strikes must be raised prior to time that jurors selected to try case are sworn. U.S.C.A. Const.Amend. 14.

3. Jury ⇐143

Defendant's pretrial motion to limit prosecutor's alleged racial use of peremptory challenges was not contemporaneous objection to composition of jury as selected, so that where no such objection was raised before jurors were sworn, defendant was barred from later raising *Batson*-type complaint. U.S.C.A. Const.Amend. 14.

SMITH, Justice.

Ford v. State, 255 Ga. 91, 335 S.E.2d 567 (1985), was pending before the Supreme Court of the United States when *Griffith v. Kentucky*, 479 U.S. ——, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), was decided on January 13, 1987. *Griffith* established the principle that the ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), applied retroactively to all cases, state or federal, pending on direct review when *Batson* was decided. Thus, in keeping with *Griffith*, supra, the Supreme Court of the United States vacated its grant of Ford's petition for writ of certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded the case to the Supreme Court of Georgia for further consideration in light of *Griffith v. Kentucky*, supra, — U.S. ——, 107 S.Ct. 1268, 94 L.Ed.2d 129 (1987).

[1] 1. *Batson* stands for the principle that a prosecutor may not strike a black juror solely because of his race, nor upon any assumption based solely upon the juror's race. 106 S.Ct. at 1723. See *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987).

2. In *Batson*, the defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen, through the use of peremptory challenges, violated his 6th and 14th Amendment rights. The *Batson* Court observed that, "[the] petitioner made a timely objection to the prosecutor's removal of all black persons on the venire." Id. 106 S.Ct. at p. 1725. The Court also observed: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Id. at p. 1724, fn. 24. It went on to state that

it expressed no view as to how a court should handle the matter, upon a finding of discrimination against black jurors, but made it clear that it must be handled in such a manner as to erase the discrimination in the jury selection.

[2] 3. *Batson* may be understood to require that any objection as to peremptory strikes be made *before* the trial of the case begins. This is further supported by *Griffith*, supra, 107 S.Ct. at p. 710, where the facts show that the motion to discharge the panel based upon a discriminatory selection of jurors was made immediately after the selection process was completed and before trial had begun. It is consistent with our holding in *State v. Sparks*, 257 Ga. 97, 98, 355 S.E.2d 658 (1987), where we held that "any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn."

4. In this case, Ford filed a "Motion To Restrict Racial Use of Peremptory Challenges."[1] This motion was based on the law as it existed at that time under *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)—that is, that the defendant must show a pattern of systematic exclusion of blacks as jurors in criminal trials within the circuit. Ford offered no proof of his contentions.

(a) The trial court denied the motion on October 10th, ten days before the trial began In commenting upon this denial on the second day of the trial, the judge stated that he had seen "numerous or several cases" in which there were black defendants and the district attorney's office struck white prospective jurors and left prospective black jurors on the jury. "I have seen that happen here and in other counties in the circuit."

(b) After the jury had been selected and sworn in, the trial court afforded the defense an opportunity to make any necessary motions. None was made.

(c) In the direct appeal from Ford's conviction, this court found that he had failed to demonstrate a pattern of systematic exclusion of blacks from criminal juries in the circuit. *Ford v. State*, 256 Ga. 81, 82(1), 335 S.E.2d 567.

5. Under *Griffith*, it is now unquestioned that Ford may insist upon the *Batson* issue, notwithstanding that his conviction preceded the date of that opinion.

But nothing in *Griffith* would warrant the extension of relief upon grounds never raised at trial. Indeed, all that *Griffith* dictates is that objections made—at trial—must be resolved under the *Batson* rule, whether or not they antedated the enunciation of that rule.[2]

6. We have delineated a time period within which a *Batson* motion is timely.

(a) In *State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658, we allowed as timely a *Batson*

1. The motion was as follows: "Now comes JAMES FORD, the Defendant in the above styled action, and moves the Court to restrict the Prosecution from using it's peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the Jury. In support of this Motion, the Defendant shows:

1.

"The Prosecutor has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race.

2.

"This case involves a black accused and the victim is a member of the white race.

3.

"It is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes.

4.

"The exclusion of members of the black race in the Jury when a black accused is being tried is done in order that the accused will receive excessive punishment if found guilty, or to inject racial prejudice into the fact finding process of the Jury. See *McCray vs. New York*, [461] U.S. 961 [103 S.Ct. 2438, 77 L.Ed.2d 1322], 33 Cr.L. 4067 (82-1381, May 31, 1983); *Taylor vs. Louisiana*, 419 U.S. 522 [95 S.Ct. 692, 42 L.Ed.2d 690] (1975).

"WHEREFORE, the Defendant prays that this Court enter an Order granting the relief requested herein."

2. "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 107 S.Ct. at 709.

motion that was made shortly after the jurors had been sworn. We held that "hereafter any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." In *Riley v. State*, 257 Ga. 91, 94(3), 355 S.E.2d 66, we held as untimely a *Batson* motion that was made after the jury had been sworn and five witnesses had testified.

[3] (b) Ford made no contemporaneous objection to the composition of the jury as selected. His pre-trial motion was not an objection to the jury as selected, but to an alleged pattern of systematic exclusion of black jurors. There was no objection made after the jury was sworn.

(c) Further, even if colloquy in the trial judge's chambers on the second day of trial might be interpreted as a *Batson* motion, it would not have been timely under *Riley v. State*, supra.

7. The determinative issue thus becomes whether our contemporaneous objection rule is a valid state procedural bar to Ford's *Batson* complaint.

In *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977), the United States Supreme Court held:

"A defendant has been accused of a serious crime, and [the trial] is the time and place for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the results that these proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification."

8. We now conclude this matter as follows:

(a) Ford's motion under *Swain*, having been decided adversely to him on appeal, cannot be reviewed in this proceeding. *Ford v. State*, supra.

(b) While the circumstances of the jury selection may raise implications under *Batson*, and are not precluded from review under the authority of *Griffith*, Ford made no objection to the composition of the jury after it was selected and before the trial commenced.

(c) The rules of our state require that a defendant who questions the composition of his trial jury must make objection "prior to the time the jurors selected to try the case are sworn." *Sparks*, supra.

(d) The failure of Ford timely to object is a valid state procedural bar to any complaint he may have under *Batson*. *Wainwright v. Sykes*, supra.

9. Upon remand from the United States Supreme Court, we adhere to our initial judgment of affirmance.

Judgment affirmed upon remand.

All the Justices concur except GREGORY and HUNT, JJ. who dissent.

GREGORY, Justice, dissenting.

Prior to trial, Ford filed a motion asking the trial court "to restrict the Prosecution from using its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the jury." This motion was denied by the trial court. Subsequently, the prosecutor exercised nine of his ten peremptory challenges against blacks.

On direct appeal, this court, like the trial court, ruled on the issue without having the benefit of the pronouncement of the United States Supreme Court in the since-decided case of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See *Ford v. State*, 255 Ga. 81(1), 335 S.E.2d 567 (1985). Now, having held that *Batson* applies retroactively to cases, such as this one, that were tried prior to *Batson* but were still pending on direct appeal when *Batson* was decided, *Griffith*

No. 84-6559. Arthur Lee Williams, Petitioner v Texas

February 23, 1987. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 682 SW2d 538.

No. 84-6722. Gabriel Ikechi Orji, Petitioner v United States

February 23, 1987. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 756 F2d 380.

No. 85-1052. Alvin Tolliver, Petitioner v United States

February 23, 1987. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 780 F2d 1177.

No. 85-1961. Eugene Leslie, Petitioner v United States

February 23, 1987. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 783 F2d 541.

No. 85-5190. Joseph A. Nurse and Curtis Johnson, Petitioners v Illinois

February 23, 1987. On petition for writ of certiorari to the Appellate Court of Illinois, First District. The motion of petitioners for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Court of Illinois, First District, for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 131 Ill App 3d 590, 475 NE2d 1000.

No. 85-5940. Carlos A. Holmes, Petitioner v Illinois

February 23, 1987. On petition for writ of certiorari to the Appellate Court of Illinois, Fifth District. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Court of Illinois, Fifth District, for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

No. 85-5949. Donnell White, Petitioner v Missouri

February 23, 1987. On petition for writ of certiorari to the Court of Appeals of Missouri, Western District. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals of Missouri, Western District, for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 694 SW2d 802.

No. 85-6252. James A. Ford, Petitioner v Georgia

February 23, 1987. On petition for writ of certiorari to the Supreme Court of Georgia. The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of Griffith v Kentucky, 479 US ——, 93 L Ed 2d 649, 107 S Ct 708 (1987).

Same case below, 255 Ga 81, 335 SE2d 567.

No. 85-6315. Xavier Williams, Petitioner v Illinois

February 23, 1987. On petition for writ of certiorari to the Appellate Court of Illinois, Third District. The

v. Kentucky, 479 U.S. ——, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the United States Supreme Court has remanded the case to us for reconsideration under *Batson*.

Today, the majority of this court holds that because Ford raised the discrimination issue before the jury selection began, it was not timely, or was not really a *Batson*-type objection at all.

While I agree that "nothing in *Griffith* would warrant the extension of relief upon grounds never raised at trial ..." [*supra* at p. 768], I cannot agree that Ford never raised a *Batson*-type claim, nor do I think that we may avoid addressing the merits of a *Batson* issue that was raised at trial on the ground that it was raised too soon under a procedural rule of timeliness that we created after the case was tried.

I do not doubt that we may establish procedural rules regarding the correct time to raise *Batson* claims. But other than the general rule that issues cannot be raised for the first time after trial, no procedural rules governing the raising of *Batson* claims were in existence when Ford's case was tried, for the very simple reason that *Batson* had not yet been decided.

We say now that the *Batson* claim should have been raised after the jury was selected. There is nothing wrong with this rule. However, Ford had no way of knowing but what if he had waited until after the jury was selected to raise the issue, we would have held that he waited too late; that he should have raised the issue prior to trial, so that the prosecutor would be on notice that his exercise of peremptory challenges would be scrutinized for racial discrimination.

Because the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim did not exist when Ford's case was tried, it cannot possibly be "the sort of firmly established and regularly followed state practice that can prevent implementation of [Ford's] federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). Moreover, such an "unannounced" and "novel application of a procedural bar of which [Ford] could not fairly be deemed

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

JAMES FORD,
Appellant,
v.
STATE OF GEORGIA,
Appellee.

Case No. 42154

MOTION FOR REHEARING AND
MEMORANDUM IN SUPPORT OF THE MOTION FOR REHEARING

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STATE OF GEORGIA,
Appellee.

Case No. 42154

MOTION FOR REHEARING

James Ford, a black man who has been convicted of capital murder, respectfully requests of this court a rehearing on the question of whether the prosecutor's peremptorily striking 9 of 10 black jurors at Mr. Ford's trial is procedurally barred as decided by this Court in its opinion announced on November 30, 1987, or requires remand of this case back to the trial court for an evidentiary hearing. In support of this motion, Mr. Ford states the following:

1. On October 24-25, 1984, Mr. Ford was convicted and sentenced to death for capital murder. During pre-trial, at the trial, and at a hearing on a motion for new trial on January 18, 1985, Mr. Ford challenged the prosecutor's racially discriminatory use of peremptory challenges.

2. The issue was raised to this Court on direct appeal and decided on the merits adversely to Mr. Ford on October 29, 1985. On January 22, 1986, a petition for certiorari was filed in the United States Supreme Court on the question of racially discriminatory use of peremptories at Mr. Ford's capital trial, No. 85-6253.

3. On February 23, 1987, certiorari was granted by the United States Supreme Court; judgment was vacated and the case was remanded back to this Court for further consideration in light of Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987).

4. On November 30, 1987, this Court held, without benefit of briefing and argument, that Mr. Ford's challenge to the prosecutor's racially discriminatory use of peremptories is now procedurally barred because it was untimely. (Slip opinion, at 8).

5. Appellant respectfully submits that this court's ruling does not comply with the United States Supreme Court order and remand in this case and overlooks critical facts supporting the adequacy of Mr. Ford's objection to the prosecutor's racially discriminatory use of peremptories.

6. The facts and circumstances of this issue in this case, and the relevant case law do not support an application of any procedural bar to review of this issue.

WHEREFORE, Mr. Ford respectfully requests this court to

grant Mr. Ford's motion for rehearing and schedule briefing and oral argument on whether Mr. Ford's challenge to racially discriminatory use of peremptories is procedurally barred, requires a remand to the trial court for an evidentiary hearing on the prosecutor's use of peremptory challenges or requires a reversal of the conviction and sentence.

Respectfully submitted,

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Appellant,
v.
STATE OF GEORGIA,
Appellee.

Case No. 42154

MEMORANDUM IN SUPPORT OF THE MOTION FOR REHEARING

On November 30, 1987, this court held, without briefing or argument, that Mr. Ford's challenge to the prosecutor's racially discriminatory use of peremptories is now procedurally barred because it was untimely. (Slip opinion, at 8).

This court in reviewing Mr. Ford's case first reached the conclusion that "Ford's motion under Swain, having been decided adversely to him on appeal, cannot be revieved in this proceeding." (Slip Op., 8). Appellant respectfully contends that this Court's conclusion cannot be squared with Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69 (1986), Griffith v. Kentucky, 479 U.S. ___, 93 L.Ed.2d 649 (1987), or the United States Supreme

Court's remand in this case.[1]

During proceedings prior to Mr. Ford's trial, trial counsel---Mr. Edge, filed a motion to object to the prosecutor's use of peremptory challenges in a racially discriminatory manner. Trial counsel "anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of peremptory strikes" ("Motion to Restrict Racial use of Peremptory Challenges"), and requested that the trial court preclude the prosecutor from so doing. At the pre-trial hearing on this question, Mr. Edge additionally requested that reasons be given for the striking of any black jurors:

> Mr. Edge: Your, Honor, in so far as evidence goes, I just would like to state in my place that its' been my experience, and the Court is aware that the district attorney and the other district attorneys have a history and a pattern when you have a defendant who is black, of using peremptory challenges to excuse po-

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1. Appellant would note that this court's opinion, decided on November 30, 1987, states that the "Supreme Court of the United States vacated its grant of Ford's petition for certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded to the Supreme Court of Georgia for further consideration in light of Griffith v. Kentucky, supra." (Slip Op., at 1-2). However, the United States Supreme Court in this case granted certiorari on March 25, 1987 and the judgment of this Court was vacated. The case was then remanded back to this court for consideration in light of Griffith. 479 U.S. ___, 94 L.Ed.2d 129, 107 S.Ct. 1268 (1987).

> tential jurors who are also black. We are requesting the Court to require the district attorney, if he does use his peremptory challenges to excuse potential black jurors, to justify on the record the reason for excusing them. His failure to do so we feel would evidence the fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.

(10/12/84 Pre-Trial T. 160-61). The trial court, relying on the evidentiary standards set out in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), denied this request. (10/12/84 Pre-Trial T. 162).

At trial it was established that the Prosecutor used peremptories to strike nine out of ten blacks. (T. 267-268). The trial court however, again implicitly relying on Swain, made note of the fact that not all blacks had been struck in Mr. Ford's case. (T. 268). Again, at a motion for new trial held on January 18, 1985, the trial judge refused to recognize the asserted violation of Mr. Ford's constitutional rights based on the prosecutor's racially discriminatory use of peremptory challenges.

On direct appeal to this court, Mr. Ford's challenge to the prosecutor's racially discriminatory use of peremptory challenges was again addressed. Ruling on the merits, this court rejected Appellant's claim, concluding that Mr. Ford "failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial

juries in the circuit." Ford v. State, 335 S.E.2d 567, 572 (Ga. 1985).

In Batson, the United States Supreme Court was required to reexamine the "evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." Batson, 90 L.Ed.2d at 77. After undertaking this examination, the Court held that with regard to use of peremptory challenges in a criminal trial, "a consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." Batson, at 87, citing, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977).

Thus the Court's holding---after establishing in Griffith that Batson is applicable to cases pending on direct appeal such as Mr. Ford's case, overrules the analysis of the trial court who relied on the fact that not all blacks had been struck and that black defendants had not been peremptorily struck in other cases, and also overrules the analysis of this court on direct appeal in concluding that Mr. Ford had failed to "establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." Ford, 335 S.E.2d at 572. Consequently, the United

States Supreme Court granted certiorari and remanded back to this court for review.

Appellant respectfully contends therefore that this court cannot now conclude "Ford's motion under Swain, having been decided adversely to him on appeal, cannot be reviewed in this proceeding." (Slip Op., 8). The United States Supreme Court remanded this case back to this court for just such review. The implied res judicata effect of this court's earlier decision on this claim cannot be reconciled with the United States Supreme Court's order vacating that very decision or this court's own order "that this court's said judgment of October 29, 1985 be hereby vacated and its opinion be withdrawn from the files." (See Attached Order of November 30, 1987).

Similarly, no distinction can now be drawn between a challenge to racially discriminatory use of peremptories under Swain and a challenge under Batson such that a claim is properly preserved under Swain but not under Batson. The claims are identical in that they challenge racially discriminatory use of peremptories as being violative of the Equal Protection Clause of the Fourteenth Amendment. Batson simply changes the evidentiary standard by which the merits of the same claim are to be determined. Having reached the merits earlier on appeal, this court should now reach the merits of Appellant's claim and order a remand to the trial court for an evidentiary hearing.

B. Adequate Objection to the Prosecutor's Racially Discriminatory Use of Peremptories Was Made in This Case.

This court's November 30, 1987 decision does not address the critical argument of trial counsel at the October 12, 1984 pretrial hearing cited above, and the express request to make the prosecutor give reasons for his striking of black jurors. Given that the trial court denied trial counsel's request, there was absolutely nothing for counsel to do contemporaneous with the striking of black jurors with peremptories during jury selection. The trial court had already ruled that the prosecutor would not be restricted in using his peremptories in a racially discriminatory manner and that the prosecutor would have to give no reasons for striking black jurors. (10/12/84 Pre-Trial T. 162)

In Batson, the Court overturned "the principal holding in Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), that the Constitution does not require in any given case an inquiry into the prosecutor's reasons for using his peremptory challenges to strike blacks from the petit jury panel in the criminal trial of a black defendant and that in such a case it will be presumed that the prosecutor is acting for legitimate trial-related reasons." Batson, at 90 (White, concurring). Consequently, Mr. Ford is now entitled to an evidentiary hearing where the prosecutor will be required to give reasons for his exercise of peremptory challenges---if such reasons can be

proffered.[2]

This court should not now say that Mr. Ford's challenge to the use of peremptories was both too early and too late. To allow this claim to go unreviewed because there was no additional objection when peremptories were employed before the jury was sworn is to ignore completely the purpose behind contemporaneous objection requirements and the circumstances of this case and issue.

It is the rule in Georgia, as elsewhere, "that objections to irregularities must ordinarily be made at a time when they may be remedied, or they are waived." Castell v. State, 301 S.E.2d 234 (Ga. 1983). At Mr. Ford's trial, the trial judge was specifically requested by defense counsel to make the prosecutor give reasons when he peremptorily struck black jurors. (10/12/84 Pre-Trial T. 161). The trial court ruled that no reasons would be required of the prosecutor for his exercise of peremptory challenges. At trial, when the prosecutor even offered to give reasons for his use of peremptories, the trial court again declined any

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2. Over three years have now gone by since the jury was struck in this case, and it is doubtful whether credible, legitimate reasons can now be proffered to justify exclusion of 90% of the black jurors through peremptories---if any legitimate reasons ever existed. This court should therefore summarily reverse Mr. Ford's conviction and sentence. See e.g., Mincey v. State, 349 S.E.2d 1, 180 Ga.App. 263 (Ga.App. 1986). Additional delay on the question of why blacks were struck would certainly make impossible any credible explanation on why peremptories were exercised in the apparent racially discriminatory manner.

showing on this question. (T. 267-268). The trial court had every opportunity to remedy the alleged error in this case and on each occasion declined to do so. The trial court did not act unreasonably under existing law, but the law has changed and a showing must now be made on the prosecutor's use of peremptories.

There is no credible argument that this Appellant was attempting to "sandbag" the court on this issue or deliberately withheld this claim to make a finding of procedural bar appropriate by this court. The trial counsel did everything that could be reasonably done to get the court to address this issue adequately. This court's rulings in State v. Sparks, 355 S.E.2d 658, 257 Ga. 97 (Ga. 1987), and Riley v. State, 355 S.E.2d 66, 257 Ga. 91, 94 (Ga. 1987), which came over two years after the jury selection in this case, cannot support the application of a procedural bar to Mr. Ford's challenge.

The rule announced in Sparks was an expressly prospective one. "[H]ereafter, any claim under Batson should be raised prior to the time the jurors selected to try the case are sworn." Sparks, 355 at 659, (emphasis added). In addition to the fact that the defense counsel in this case had objected to the prosecutor's anticipated racially discriminatory use of peremptories and requested that the prosecutor give reasons before the jury was sworn, the considerations that led to the court reaching the merits of Sparks' claim are even greater in this case. This

court appropriately afforded Sparks a remand on his Batson claim "because there have been no judicial guidelines regarding the time and manner in which such a claim is to be presented. . . ." Sparks, at 659.

This court's holding in Riley is similarly no precedent for declining to reach the merits of Mr. Ford's claim since Riley presumably never objected to the discriminatory use of peremptories pre-trial or requested that the prosecutor give reasons for striking blacks before the jury was sworn as was done by Mr. Ford. Appellant would also note that jury selection in Riley took place after the United States Supreme Court's decision in Batson, and the contours of a Batson challenge were clearer.

Additionally, as is noted by Justice Gregory in his dissent, the application of a procedural bar in this case on this issue cannot be supported as a "firmly established and regularly followed state practice" that should bar implementation of federal constitutional rights. James v. Kentucky, 466 U.S. 341 (1984); Hathorn v. Lovorn, 457 U.S. 255, 262-263 (1982).[3]

Even assuming that trial counsel did not satisfy procedural requirements, the application of a procedural bar under the

3. Even assuming the existence of a valid state bar on this question in this case, there would exist adequate "cause and prejudice" to excuse such a default for the purposes of federal habeas review. See, Engle v. Issac, 456 U.S. 107 (1982); Francis v. Henderson, 425 U.S. 536 (1976).

circumstances of this case on this issue is simply without purpose. To be legitimate, a state procedural rule must be "clearly announced to defendant and counsel." Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965); Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986). "Giving effect to the contemporaneous objection rule for its own sake would be to resort to an arid ritual of meaningless form." Henry, 379 U.S. at 449.

It is also particularly discouraged in a capital case. This court has "been less stringent in [its] enforcement of the contemporaneous objection rule as to error that may affect a sentence of death because [it] must under [Georgia law] determine whether the sentence was imposed as a result of passion, prejudice or other arbitrary factor." Castell, 301 S.E.2d at 246. See also, Gilreath v. State, 279 S.E.2d 650, 670 (Ga. 1983); Potts v. State, 243 S.E.2d 510, 523 (Ga. 1978); Conner v. State, 303 S.E.2d 266, 275 (Ga. 1983). Consequently, a procedural bar cannot be appropriately applied in this case.

CONCLUSION

This court should grant Mr. Ford's motion for rehearing and order full briefing and argument, or in the alternative remand this case back to the trial court for an evidentiary hearing on the prosecutor's racially discriminatory use of peremptories, or summarily reverse the conviction and sentence.

Respectfully submitted,

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a complete and well considered opinion to this Court.

"1. Standard 4

"With respect to Standard 4, the *Brooks* case, supra, establishes that an attorney-client relationship is not necessary in order to find that an attorney was acting in a professional capacity. Assuming there was no attorney-client relationship between Respondent and the Jones Estate, the Board concludes that Respondent was nevertheless acting in a professional capacity. Respondent probated the Estate in the Probate Court of Richmond County. It was the policy of the Probate Court Judge that any person offering documents for probate must employ counsel. Respondent did not employ independent counsel to perform this function for the estate. In addition, Respondent's law firm, Harrison & Roper, appears on all pleadings regarding the Estate of Gwendolen Ellis Jones. Respondent submitted statements for professional services to the Estate. Finally, Respondent retained the C & S Bank as his agent to perform nonlegal services for the Estate.

"Standard 4 also requires a finding that the attorney's conduct involved dishonesty, fraud, deceit or wilful misrepresentation. Based on the findings that Respondent failed to account to the Estate of Gwendolen Ellis Jones for approximately $78,000, and Respondent converted these funds to his own use, the Board concludes that Respondent's conduct was dishonest, fraudulent and deceitful in violation of Standard 4.

"2. Standard 65

"Count Two of the Formal Complaint also charges Respondent with a violation of Standard 65 on the theory that Respondent failed to account for property of the Estate of Gwendolen Ellis Jones held in a 'fiduciary capacity'. This theory is mentioned in *footnote one* (1) of the *Dowdy* opinion, supra. In his Answer to the Formal Complaint, Respondent contends that he is not subject to discipline because he acted in his capacity as an administrator, not as an attorney. As administrator for the Estate of Gwendolen Ellis Jones, Respondent owed a fiduciary responsibility to the Estate. This responsibility was breached when Respondent failed to account for Estate funds and converted the funds to his own use. These actions on the part of a lawyer serving in a fiduciary capacity are just as reprehensible as if the lawyer had been handling the money of a client to whom he would have the same fiduciary responsibility. The Board therefore concludes that Respondent breached his fiduciary duty to the Estate by failing to account to the Estate for funds entrusted to him, in violation of Standard 65 of Bar Rule 4-102."

The Board recommended that Respondent be disbarred from the practice of law in the State of Georgia. We follow that recommendation. It is ordered that D. Landrum Harrison be stricken from the role of attorneys allowed to practice law in this state.

It Is So Ordered.

All the Justices concur.

v.

The STATE.

No. 42154.

Supreme Court of Georgia.

Oct. 29, 1985.

Defendant was convicted in the Coweta Superior Court, William F. Lee, Jr., J., of armed robbery, rape, kidnapping with bodily injury, burglary and murder, and was sentenced to death, and he appealed. The

Supreme Court, Smith, J., held that: (1) showing that large percentage, but not all, of black prospective jurors were peremptorily struck by prosecution failed to establish systematic exclusion of black jurors; (2) trial court did not abuse its discretion by denying defendant's motion for sequestered voir dire; (3) trial court did not err by refusing to grant defendant extra peremptory strikes; (4) trial court did not err in refusing to change venue; (5) trial court did not err by finding confession to have been voluntary; (6) practice of death qualification of jurors is constitutional; (7) neither trial attorney's performance nor prosecutor's improper argument justified reversal; and (8) death sentence was proper.

Affirmed.

1. Burglary ⇐41(1)
Homicide ⇐250
Kidnapping ⇐5
Rape ⇐51(1)
Robbery ⇐24.1(3)

Evidence was sufficient to support conviction of defendant of armed robbery, rape, kidnapping with bodily injury, burglary and murder.

2. Jury ⇐33(5.1)

Showing that large percentage, but not all, of black prospective jurors were peremptorily struck by prosecution failed to establish systematic exclusion of black jurors, leading to general condition that black citizens did not serve on criminal trial juries in the circuit.

3. Criminal Law ⇐708(4)

State was constitutionally required to reveal to defendant agreement reached with codefendant for his testimony.

4. Jury ⇐131(13)

Trial court did not abuse its discretion by denying defendant's motion for sequestered voir dire.

5. Jury ⇐136(4)

Trial court did not err by refusing to grant defendant extra peremptory strikes, in addition to the 20 authorized. O.C.G.A. § 15-12-165.

6. Criminal Law ⇐126(1)

Even though almost all prospective jurors had heard at least something about the case, trial court did not err in refusing to change venue, in view of limited amount of prejudicial pretrial publicity and low percentage of veniremen excused for bias, prejudice or a fixed opinion.

7. Criminal Law ⇐531(3)

Trial court did not err by finding confession to have been voluntary, in view of lack of any evidence of threats or promises by officers or requests for attorney by defendant.

8. Jury ⇐33(2.1)

Practice of death qualification of jurors is constitutional.

9. Criminal Law ⇐641.13(1)

Bench mark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined proper functioning of adversarial process that trial cannot be relied on as having produced just result. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(1)

In order to prevail on ineffectiveness claim, convicted defendant must show that counsel's performance was deficient, i.e., that counsel's performance was not reasonable under all circumstances, and that this deficient performance prejudiced defense, i.e. that there was reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(1), 1134(2)

Defendant's failure to establish either performance or prejudice component of ineffectiveness claim results in denial of claim, and reviewing court need not address both components if defendant makes insufficient showing on one, nor must components be addressed in any particular order. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(7)

Defendant was not prejudiced by any failure of his trial attorney to offer "vast wealth of data now available" on subject of constitutionality of death penalty law. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(2)

Defendant was not prejudiced by trial counsel's failure to support with evidence his challenge to practice of death-qualifying jury. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(2)

Trial counsel's effort to change venue was not deficient, and defendant failed to establish any reasonable possibility that, had suggested additional action been taken, change of venue would have been granted. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐641.13(2)

There was nothing in implied malice instruction to which trial counsel could have objected and thus counsel's failure to object to instruction did not deprive defendant of effective assistance of counsel. O.C.G.A. § 16-5-1(b).

16. Criminal Law ⇐306

Permissive presumption is not unconstitutional so long as it is rational.

17. Criminal Law ⇐641.13(2)

Trial counsel was not remiss in failing to object to intent instruction which was not reasonably susceptible of interpretation that relieved prosecution of its burden of proving intent beyond reasonable doubt or otherwise undermined fact-finding responsibility of jury. U.S.C.A. Const.Amend. 6.

18. Criminal Law ⇐641.13(2)

Trial counsel's failure to object to proper charge on conspiracy did not show ineffectiveness. U.S.C.A. Const.Amend. 6.

19. Criminal Law ⇐641.13(2)

Trial counsel was not ineffective for failing to request charge on prior inconsistent statements as substantive evidence, where jury, absent instructions to the contrary, surely considered substantively all the evidence presented to it. U.S.C.A. Const.Amend. 6.

20. Criminal Law ⇐286

Special plea of incompetence requires determination of whether defendant at time of trial is capable of understanding nature and object of proceedings against him and is capable of assisting his attorney with his defense.

21. Criminal Law ⇐641.13(5)

Defendant failed to meet his burden of establishing deficiency or prejudice in failure of trial counsel to file special plea or to move for additional expert assistance on issue of his competence, where there was no indication that defendant did not understand nature and object of proceedings or was incapable of assisting his attorney. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⇐641.13(6)

Defendant failed to establish that trial counsel's presentation or failure to present evidence of defendant's psychotic episodes was deficient, where defendant failed to establish that he was subject to such episodes. U.S.C.A. Const.Amend. 6.

23. Criminal Law ⇐641.13(2), 713

Permissible arguments, no matter how effective, do not contravene fundamental fairness; likewise, failure to object to permissible arguments cannot establish deficient attorney performance. U.S.C.A. Const.Amend. 6.

24. Criminal Law ⇐1037.1(1)

Where prosecutor argues improperly and no objection is interposed, whether reversal is required depends upon evaluation of prejudice that is undertaken in essentially identical manner whether improper arguments are considered directly or in context of ineffectiveness claim.

25. Criminal Law ⇐641.13(2)

Trial counsel's failure to object to prosecutor's comment, during opening statement, that evidence was "horrible and gruesome" did not constitute ineffective assistance, where this description was accurate. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⇐641.13(2)

Trial counsel was not ineffective in failing to object to prosecutor's comment that he wished to show a "video tape of what happened," but since he could not, he would "try to explain it" in such a way that "if you will try to imagine in your minds as if you're watching television * * * you'll see how the case is going to be presented to you and why it's presented in a certain way," where there was nothing objectionable in such comment. U.S.C.A. Const. Amend. 6.

27. Criminal Law ⇐719(3)

Although expressions of personal opinion by attorney are objectionable and should be avoided, nonetheless, when evidentiary facts supporting such conclusion are cited and conclusion follows naturally from such facts, mere use of phrase "I think * * *" as opposed to "I contend * * *" or "I submit * * *" or "The evidence shows * * *," is unlikely to have strong impact on jury's independent evaluation of evidence.

28. Criminal Law ⇐641.13(2)

Although trial counsel should have objected to prosecutor's expressions of personal opinion and misstatement of law in his closing argument, there was no reasonable probability that the exclusion of such arguments would have changed result at guilt-innocent phase of trial. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⇐713

Although there are other legitimate sentencing concerns besides retribution, prosecutor is under no obligation to argue all of them.

30. Criminal Law ⇐723(1)

Prosecutor did not err by noting obvious fact that victim was gone and would never be here again.

31. Criminal Law ⇐713

Prosecutor did not err by arguing: "[O]ur government has determined that the death penalty is appropriate and necessary in certain cases and should be provided * * * It's up to you to decide if this is that type of case that deserves the death penalty."

32. Criminal Law ⇐723(3)

Prosecutor's argument that law and order depended upon confidence of citizenry that criminals would receive punishment they deserved was not improper.

33. Criminal Law ⇐723(1, 2)

Prosecutor committed no impropriety by arguing that jury was commanded "to do what is right and what is just"; by following his discussion of heinousness of crime with dramatic assertion that victim would be "in there" with the jury, asking for justice; or by concluding "By God we draw the line somewhere and this is it folks. Enough is enough and we draw the line. You say it for [the victim], say it for all of us, enough is enough. It's got to stop. Thank you."

34. Criminal Law ⇐723(1), 1171.1(6)

Prosecutor's argument, at sentencing phase, confusing forgiveness with mercy, in arguing that jury had no right to be merciful, was legally incorrect, but there was no reasonable probability that, but for improper argument, defendant would have received life sentence.

35. Criminal Law ⇐1205

Just as retribution is appropriate justification for imposing capital sentence, so is mercy an acceptable sentencing rationale.

36. Criminal Law ⇐713

Prosecutor is entitled to urge vigorously that death sentence is appropriate punishment in case at hand.

37. Criminal Law ⇐713

Prosecutor is entitled to urge vigorously that mercy is inappropriate in case at hand.

38. Homicide ⇐354

Evidence supported jury's finding in regard to aggravating circumstance that offense of murder was committed while defendant was engaged in commission of additional capital felonies of rape, kidnapping with bodily injury and armed robbery. O.C.G.A. § 17-10-30(b)(2).

Cite as 335 S.E.2d 567 (Ga. 1985)

39. Homicide ⇐354

Finding of aggravating circumstance that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind" was supported by evidence that victim was kidnapped, raped, stuffed into trunk of her own car, driven around for several hours, hit on the head with metal road sign and pushed into pond where she drowned. O.C.G.A. §§ 17-10-30(b)(7), 17-10-35(c)(2).

40. Criminal Law ⇐1208.1(4)

Sentence of death was not imposed under influence of passion, prejudice or other arbitrary factor. O.C.G.A. § 17-10-35(c)(1).

41. Criminal Law ⇐983

Defendant's death sentence was not disproportionate to life sentence received by codefendant, where evidence tended to show that defendant was the more culpable, that he, not codefendant, drove car, raped victim, hit her with road sign, left car out of gear prior to pushing it into pond, and got the money.

42. Homicide ⇐354

Death sentence imposed on defendant convicted of armed robbery, rape, kidnapping with bodily injury, burglary and murder was neither excessive nor disproportionate to sentences imposed in similar cases generally. O.C.G.A. § 17-10-35(c)(3).

Nelson Jarnagin, Harvey & Jarnagin, Atlanta, for James A. Ford, Jr.

Art Mallory, Dist. Atty., LaGrange, Michael J. Bowers, Atty. Gen., Atlanta, for the State.

SMITH, Justice.

This is a death penalty case. Appellant, James A. Ford, was convicted in Coweta County of armed robbery, rape, kidnapping with bodily injury, burglary, and murder. The case is here on direct appeal, for review under the Unified Appeal Procedure (252 Ga. A-13 et seq.), and for the sentence review required by OCGA § 17-10-35.[1] We affirm.

FACTS

The victim, Sarah Dean, managed the J & L gas station in Newnan. She usually began work at 6:00 a.m. Shortly after 5:00 a.m. on March 1, 1984, a burglar alarm went off at the station. Police responding to the call found the front door unlocked but nothing else out of the ordinary; however, attempts to contact Mrs. Dean were unsuccessful. Pending the arrival of the district supervisor from Marietta, the door was re-locked and the police left.

Soon afterwards, an employee of a neighboring business observed a small black male exiting J & L by a window, and contacted the police. Acting on information obtained from his mother, police questioned Steve Cox, who was found to be in possession of keys to the J & L station. Cox implicated Ford, and, shortly before 2:00 p.m., a warrant was obtained for the latter's arrest.

At approximately 3:00 p.m., Sarah Dean's automobile was located, submerged to its roof in a pond. After pulling the car out with a wrecker, police used the keys (which were in the ignition) to open the trunk, where they discovered the body of Sarah Dean.

Three hours later, Ford was arrested, after a high-speed automobile chase. He was found to be in possession of over $2000.

Ford subsequently gave a written confession, which can be summarized as follows: He and Steve Cox, having decided to get some money to pay a fine, arrived at J & L just as the victim was preparing to leave, and forced their way into her car. Ford drove to a secluded area, where they un-

1. The jury returned its verdict as to sentence on October 25, 1984. A motion for new trial was filed November 26, 1984, amended on January 7, 1985, heard January 18, 1985, and denied February 19, 1985. A notice of appeal was filed March 14, 1985, and the record was docketed in this court on March 29, 1985. The case was orally argued June 4, 1985.

dressed the victim and "had sex" with her. Afterwards, they put her in the trunk and drove around—buying marijuana with money they found in the victim's purse; driving to Atlanta, where Ford visited a girlfriend; and returning to Newnan, where they spent an hour in a tavern. Next, they drove to a more secluded area. Ford opened the trunk and hit the victim on the head with a road sign. Finally, they pushed the car into a pond (with the victim still in the trunk). After disposing of the victim, the two returned to J & L on foot and used the victim's keys to enter the station. Ford got "a large amount of money out of the cabinet," and left by the front door when the police arrived.

Cox testified at trial. His testimony was generally consistent with Ford's confession, except he claimed that only Ford raped the victim. In addition, he testified that when they first entered the victim's car, Ford held a butcher knife to the victim's neck; that Ford threatened to kill the victim during the rape and again while they were at the tavern; that Ford responded to the victim's plea for mercy by telling her to "shut up;" and that as the car rolled into the pond, Cox could hear the victim beating on the trunk-lid.

Ricky Wright testified that on the morning of March 1 he and Ford went shopping in Atlanta. En route, Ford admitted to Wright that he had burglarized J & L, raped the woman who managed it, put her in the trunk of her car and pushed the car into a pond. According to Wright, Ford was laughing and smiling as he described the crime. Wright testified that Ford had a large sum of money and gave Wright $150.

An autopsy established that the victim had drowned. Serological examination of vaginal swabbings positively established that sexual intercourse had recently occurred. Hairs found on the victim were consistent with having come from Ford (and inconsistent with having come from Cox).

[1] The evidence overwhelmingly establishes Ford's guilt, and, therefore, more than suffices to meet the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

ENUMERATIONS OF ERROR

[2] 1. In his 2nd enumeration, Ford contends that the prosecutor's use of peremptory strikes to remove 9 of 10 possible black jurors denied Ford his right to a jury comprised of a fair cross-section of the community. (One black served on the jury.) Ford has shown only that a large percentage—but not all—of black prospective jurors were peremptorily struck by the prosecution in *this* case. "He has failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." *Moore v. State*, 254 Ga. 525, 525(2(b)), 330 S.E.2d 717 (1985). Accordingly, we find no error here.

[3] 2. Prior to trial, the state reached an agreement with Steve Cox whereby, in exchange for his truthful testimony, he would be prosecuted only for armed robbery and burglary and the state would recommend "life plus 20," or, in other words, the maximum sentences for these crimes. The state, of course, was constitutionally required to and did reveal this information to Ford. *Owens v. State*, 251 Ga. 313(1), 305 S.E.2d 102 (1983).

When Cox testified, the state lost no time in addressing this subject. When the state asked Cox what sentence he was going to get, Cox answered, "Six years." As the state prepared to refresh his recollection, the court interrupted to state: "Let me tell you right here and now you're not going to get any six years, do you understand that?" The state then proceeded to establish Cox's understanding that the recommended sentence was going to be life plus 20 years, and not 6 years.

In his 3rd enumeration of error, Ford contends that the court's comment was an improper expression of opinion. See OCGA

§ 17-8-57.[2] We need not determine whether this code section actually was violated, inasmuch as Ford neither objected nor moved for a mistrial. *State v. Griffin*, 240 Ga. 470, 241 S.E.2d 230 (1978). We note, however, that Ford does not, even now, contest the truth of the court's comment, see *Abbott v. State*, 91 Ga.App. 380(3), 85 S.E.2d 615 (1955), or contend otherwise than that regardless of the court's comment, the state had a constitutional duty to correct Cox's misconception, see *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and if, as a result, Cox's credibility was adversely affected, Ford plainly was benefitted thereby.

[4] 3. The trial court did not abuse its discretion by denying Ford's motion for sequestered voir dire. *Finney v. State*, 253 Ga. 346(2), 320 S.E.2d 147 (1984). Enumeration 5 is without merit.

[5] 4. Regarding Ford's 6th enumeration, we find that the trial court did not err by refusing to grant Ford extra peremptory strikes, in addition to the 20 authorized by OCGA § 15-12-165.

[6] 5. Enumeration 7 complains of the trial court's refusal to change venue. Although almost all of the prospective jurors had heard at least something about the case, in view of the limited amount of prejudicial pre-trial publicity shown in this case, and the low percentage of veniremen excused for bias, prejudice or fixed opinion (5 of 60 or 8%),[3] the trial court did not err. *Devier v. State*, 253 Ga. 604(4), 323 S.E.2d 150 (1984); *Waters v. State*, 248 Ga. 355(1), 283 S.E.2d 238 (1981).

6. After his arrest, Ford gave two statements. The trial court excluded the second statement but ruled that the first statement was voluntary and admissible.[4] In his 8th enumeration, Ford complains of the court's refusal to exclude the first statement.

[7] Ford was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and signed a form waiving those rights after officers read the form and explained each portion of the form as they went along. In view of the lack of any evidence of threats or promises by the officers, or of a request for an attorney by Ford, the court did not err by finding the confession to have been voluntary.

[8] 7. We adhere to our position that the practice of death-qualification of jurors is not unconstitutional. *Mincey v. State*, 251 Ga. 255(2), 304 S.E.2d 882 (1983), despite the Eighth Circuit Court of Appeals' holding to the contrary. See *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir.1985). We agree with the Missouri Supreme Court that *Grigsby* is contrary not only to the overwhelming weight of state and federal authority but also to *Wainwright v. Witt*, 469 U.S. ——, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). *State v. Nave*, 694 S.W.2d 729 (Mo. 1985). Therefore, we find enumeration 9 to be without merit.

8. After trial, Ford's family retained a private attorney to represent him in the post-conviction proceedings, including the motion for new trial and the appeal. The court-appointed trial attorney was dismissed. Ford contends in his 4th enumeration of error that his trial attorney rendered ineffective assistance of counsel, particularly at the sentencing phase of the trial.

[9, 10] "The bench mark for judging any claim of ineffectiveness must be

2. OCGA § 17-8-57 provides: "It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express his opinion as to what has or has not been proved or as to the guilt of the accused ..."

3. In addition, 3 jurors who underwent voir dire were excused for prejudice or bias for or against the death penalty, and one was excused because she had served on the grand jury.

4. The court's original pre-trial ruling on this issue was insufficiently specific. See Pre-trial Transcript, October 12 hearing, p. 211; *Cofield v. State*, 247 Ga. 98(4), 274 S.E.2d 530 (1981). However, the court subsequently clarified its ruling. See Trial Transcript p. 350; *Parks v. State*, 254 Ga. 403(1), 330 S.E.2d 686 (1985).

whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, ——, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffectiveness claim, a convicted defendant must show (1) "that counsel's performance was deficient," i.e., that counsel's performance was not reasonable under all the circumstances, and (2) that this "deficient performance prejudiced the defense," i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at ——, 104 S.Ct. at 2064. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid.

[11] The complaining defendant must make both showings. His failure "to establish either the performance or the prejudice component results in the denial of his Sixth Amendment claim." *King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir.1984). A reviewing court need not "address both components if the defendant makes an insufficient showing on one," *Washington v. Strickland*, supra at ——, 104 S.Ct. at 2069, nor must the components be addressed in any particular order. Ibid.

With the foregoing in mind, we shall now undertake to address the various acts and omissions allegedly demonstrating ineffective representation. For reasons discussed below, we consider this enumeration of error together with enumeration 1, in which Ford complains of the prosecutor's argument at the sentencing phase of the trial.

(a) Ford claims that his trial attorney, Arthur Edge IV, should have offered the "vast wealth of data now available" on the subject of the constitutionality of Georgia's death penalty law, and claims that "[c]ompetent counsel would have known that this very issue is currently awaiting *en banc* decision by the United States Court of Appeals for the Eleventh Circuit in *McCleskey v. Zant* ..."

[12] In view of the decision since rendered by the *en banc* Eleventh Circuit on this issue, Ford clearly was not prejudiced by any omission here. See *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (affirming the denial of habeas relief on the ground of racial bias in the administration of the death penalty, and reversing the grant of habeas relief on another ground).

[13] (b) Nor do we find any possible prejudice from counsel's failure to support with evidence his challenge to the practice of death-qualifying the jury. See Division 7, supra.

(c) Ford claims that attorney Edge made an insufficient effort to change venue. He asserts: "Competent counsel would have engaged an expert, or experts, to analyze the pretrial publicity; and to conduct a survey of the community and/or the prospective jurors to determine community sentiment. Counsel could have called numerous witnesses—being a resident of the area—to attest to the way knowledge and gossip circulate in a community of less than 40,000 people."

That counsel could have taken action that he did not does not necessarily render his performance deficient. Ford does not show how an expert analysis of pretrial publicity could have accomplished any more than the introduction in evidence of whatever publicity existed. Nor has he explained why competent counsel could not reasonably assume that the voir dire of prospective jurors would establish community sentiment at least as well as a "survey of the community and/or the prospective jurors." (In particular, it would seem that the voir dire *is* a survey of the prospective jurors.)

[14] We find no deficiency here, and, in addition, Ford has not established any reasonable probability that, had the suggested additional action been taken, a change of venue would have been granted.

(d) At the guilt-innocence phase of the trial, the court charged (inter alia):

"Malice *may be implied* where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." (Emphasis supplied.)

"[Intent] may be inferred from the proven circumstances or by acts and conduct or it *may be presumed* when it is the natural and necessary consequence of the act." (Emphasis supplied.)

Attorney Edge neither objected to these instructions, nor reserved any objections to them. See *Rivers v. State*, 250 Ga. 903, 309, 298 S.E.2d 1 (1982). Ford now claims that competent counsel would have detected the "clear *Sandstrom* problems" with these instructions, and would have objected. See *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

[15] We find nothing objectionable in the implied malice instruction. Compare OCGA § 16-5-1(b); *Lamb v. Jernigan*, 683 F.2d 1332, 1340 (11th Cir.1982).

[16] As to the intent instruction, we have previously stated our preference for charges stated in terms of "inferences" rather than presumptions (except as to the defendant's sanity and, of course, his innocence). See, e.g., *Rose v. State*, 249 Ga. 628, 631, 292 S.E.2d 678 (1982). "[T]he term 'inference' has tended to be used more frequently [than the term 'presumption'] for gridentiary devices that are permissive in nature ..." *Lamb v. Jernigan*, supra at 1335-36 (fn. 4). Nevertheless, a "presumption" is not necessarily mandatory, and a permissive presumption is not unconstitutional so long as it is rational. *Ulster County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224-25, 60 L.Ed.2d 777 (1979).

[17] The intent instruction here "was not reasonably susceptible of an interpretation that relieved the prosecution of its burden of proving intent beyond a reasonable doubt or otherwise undermined the factfinding responsibility of the jury." *Lamb v. Jernigan*, supra at 1340 (addressing an intent instruction identical to the one given in this case).

From the foregoing, it can readily be seen that attorney Edge was not remiss in failing to object to the above charges and that the defense was not prejudiced by the failure to object.

[18] (e) There likewise being no error in the court's charge on conspiracy, *Anderson v. State*, 153 Ga.App. 401(3), 265 S.E.2d 299 (1980), Edge's failure to object to the charge does not show ineffectiveness of counsel.

[19] (f) We fail to see how Edge can be condemned for failing to request a charge on prior inconsistent statements as substantive evidence. Absent instructions to the contrary, the jury surely regarded substantively *all* the evidence presented to it. See *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

(g) Ford claims that attorney Edge should have obtained an independent psychiatric evaluation of the defendant, and should have filed a special plea challenging his competency.

Ford was evaluated prior to trial, by Dr. Donald P. Grigsby, Ph.D., chief of forensic services at the West Georgia Central Regional Hospital. Dr. Grigsby's report, included in the record, attached to the report of the trial judge (see OCGA § 17-10-35(a)), reads, in part, as follows:

"James Ford has never been a prior patient at this hospital or at Central State Hospital; he did spend one year at the Milledgeville Youth Detention Center between the age of 15 and 16. James Ford has no record of prior psychiatric treatment in the State of Georgia.

"James Ford's current mental results are as follows: He is an 18 year old black male that looks his stated age ... Numerous scars are located on his right forearm; otherwise, no remarkable body/facial characteristics/asymmetries were noted. His eye contact was fair. No tremors or shakes or other psychomotor problems were noted. Vision and hearing appeared normal. His speech was forceful and short and to the point; he was relevant and coherent. Posture and gait were normal. His behavior during testing was attentive, he was coop-

erative but guarded and acted like a tough man. No impairment of memory function was seen. He was in touch with reality and his thoughts progressed from stimulus to logical conclusion. No abnormal psychiatric content of thought was noted. His affect was appropriate and flat; his mood was somewhat defiant and macho. He was oriented to time, person and place. His intellect appeared dull and his judgment slightly impaired as measured with the Mental Status Exam.

"Neurological screening was negative at this time. Emotional indicators on the Bender would suggest some anxiety.

"Intellectual assessment with the WAIS-R produced a Full Scale IQ of 73, placing him within the borderline range of intelligence. This is believed to be a valid assessment of his current level of functioning.

"Objective personality assessment was attempted but not successfully completed with the short form MMPI. The test was administered to James Ford; however, the results were invalidated by his 'faking sick.' This examiner did not detect the presence of any psychiatric disorder.

"It is the professional opinion of this examiner that James Ford is both legally competent to stand trial and criminally responsible for his behaviors. He is aware of the charges against him, he understands the nature of the judicial process, and he is able to consult with his attorney in building his defense. In regards to his criminal responsibility, it is the professional opinion of this examiner that he did and does know right from wrong and at the time of the alleged crime there was no evidence, whatsoever, for a delusional compulsion."

[20, 21] We do not have, on this record, any testimony from Edge as to why he did not move for an independent evaluation, or file a special plea of incompetence. Thus, we can only speculate as to the extent to which Edge might have relied upon, for example, his own observations of the defendant, or other matters, in addition to the above report. In any event, a special plea of incompetence requires "a determination of whether the defendant at the time of the trial is capable of understanding the nature and object of the proceedings against him and is capable of assisting his attorney with his defense." *Brown v. State*, 250 Ga. 66, 70, 295 S.E.2d 727 (1982). There being no indication in the record that Ford did not understand the nature and object of the proceedings or was incapable of assisting his attorney, Ford has failed to meet his burden of establishing deficiency or prejudice in the failure of trial counsel to file a special plea or to move for additional expert assistance on this issue. Compare *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

(h) In a related vein, Ford contends that "crucial" mitigating evidence was "either not presented or was presented in a superficial manner which could not have informed the sentencing jury of its importance or weight."

Dr. James Thomas, a pediatrician, testified on behalf of the defense at the hearing on the motion for new trial. On November 8, 1973, when Ford was eight years old, Dr. Thomas diagnosed him as being hyperactive. He prescribed Ritalin, described in the Physician's Desk Reference (PDR) (1985 Edition) as a "mild central nervous system stimulant." Id. at 865. Ford took Ritalin (during the school year) for several years; Dr. Thomas last prescribed the drug on January 17, 1977 (but it was possibly refilled for a limited time afterwards).

Ford's mother testified at the sentencing phase of the trial that "he was a hyperactive kid." However, no evidence was presented at trial that Ford had taken Ritalin for this condition.

Ford calls our attention to the following warning in the PDR (p. 865):

"Drug Dependence

"Ritalin should be given cautiously to emotionally unstable patients, such as those with a history of drug dependence or alcoholism, because such patients may increase dosage on their own initiative.

"Chronically abusive use can lead to marked tolerance and psychic dependence with varying degrees of abnormal behavior. Frank psychotic episodes can occur, especially with parenteral abuse.[5] Careful supervision is required during drug withdrawal, since severe depression as well as the effects of chronic overactivity can be unmasked. Long-term follow-up may be required because of the patient's basic personality disturbances."

Ford argues: "Clearly, evidence that Appellant, due to his prolonged use of Ritalin, was subject to psychotic episodes was evidence which would have carried a great deal of weight with his sentence. The state's case on punishment would have been effectively rebutted by a showing of another explanation for Appellant's behavior besides that he was evil and malicious."

This argument is based upon a misreading of the PDR. The quoted warning does not address itself to normal usage of Ritalin, even if "prolonged." It addresses, instead, "[c]hronically abusive use."

[22] Not only has Ford not shown that he actually suffered psychotic episodes, he has presented no evidence of chronically abusive use which would have the potential to cause such episodes. Thus, Ford has failed to establish that he was subject to psychotic episodes due to his use of Ritalin, and, therefore, has failed to establish that Edge's performance in this respect was deficient.

(i) Finally, Ford complains of Edge's failure to object to allegedly improper argument by the state, at both phases of the trial. In addition, he contends in his first enumeration of error that the prosecutor's improper closing argument at the sentencing phase of the trial rendered the imposition of sentence fundamentally unfair, citing *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983).

We begin our analysis of these complaints by observing that the portion of *Hance v. Zant* addressing prosecutorial argument has been overruled. See *Brooks v. Kemp*, 762 F.2d 1383, 1399 and 1404–1405 (11th Cir.1985); *Tucker v. Kemp*, 762 F.2d 1480, 1486 (11th Cir.1985). Compare *Conner v. State*, 251 Ga. 113(5), 303 S.E.2d 266 (1983) (expressing our disagreement with *Hance*). We find the correct approach to be as follows.

[23] First, permissible arguments, no matter how effective, do not contravene fundamental fairness; likewise, a failure to object to permissible arguments cannot establish deficient attorney performance.

[24] Second, where the prosecutor argues improperly and no objection is interposed, whether reversal is required depends upon an evaluation of prejudice that is undertaken in an essentially identical manner whether the improper arguments are considered directly or in the context of an ineffectiveness claim. Compare *Strickland v. Washington*, supra (prejudice is established by a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"), with *Brooks v. Kemp*, supra (applying *Strickland* "reasonable probability" test in context of improper prosecutorial argument), and *Conner v. State*, supra (where argument not objected to, we determine only whether impropriety was so egregious that death sentence was imposed as a result of passion, prejudice or other arbitrary factor).

Thus, our evaluation of Ford's direct attack upon the prosecutor's sentence-phase argument, as well as his indirect attack upon the prosecutor's argument in general, via his ineffectiveness claim, may be undertaken by determining, first, which (if any) portions of the state's argument were improper, and, second (if impropriety is

5. Ford misquotes this term as "parental" abuse, instead of "parenteral" abuse. The adjective parenteral means: "1. outside the intestine 2. brought into the body through some way other than the digestive tract, as by subcutaneous or intravenous injection." Webster's New World Dictionary of the American Language, 2nd College Edition 1970. Ritalin, offered only in tablet form, is properly taken orally.

discovered), whether the improper arguments were so egregious as to require a new trial.

(i-1) The guilt-innocence phase.

[25] Ford complains that during the prosecutor's opening statement the evidence was described as "horrible and gruesome." Since this was an accurate description, we find nothing objectionable about it, despite Ford's contention that it was argumentative and inflammatory.

[26] Nor do we find anything objectionable in the prosecutor's comment that he wished he could show a "video tape of what happened," but since he could not, he would "try to explain it" in such a way that "if you will try to imagine in your minds as if you're watching television ... you'll see how the case is going to be presented to you and why it's presented in a certain way."

In the prosecutor's closing argument, however, we do find improprieties, including expressions of personal opinion and a misstatement of the law.

Regarding the expressions of personal opinion, we note that Directory Rule 7-106(c) of our State Bar Canons of Ethics states in part: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (3) assert his personal knowledge of the facts in issue, except when testifying as a witness; (4) assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." 252 Ga. at 629.

"Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." Commentary to ABA Standards for Criminal Justice 3-5.8(b) (2d Ed. 1980), p. 3-89.

[27] The prejudice emanating from such argument depends upon the context in which it is given. Although expressions of personal opinion are objectionable in any event, and should be avoided, nonetheless, when the evidentiary facts supporting such a conclusion are cited and the conclusion follows naturally from such facts, the mere use of the phrase "I think ..." as opposed to "I contend ...," or "I submit ...," or "The evidence shows ...," is unlikely to have a strong impact on the jury's independent evaluation of the evidence. *Cf. Conklin v. State*, 254 Ga. 558, 571, 331 S.E.2d 532 (1985); *Brooks v. Kemp*, supra, 762 F.2d at 1413-1414.

[28] Here, the prosecutor stated that he didn't "think" there was "any question" but that the butcher knife Ford wielded was a deadly weapon, that he "really" did not "think" the money Ford got was worth Sarah Dean's life, and that although the jury would have a hard job deciding the case, he "imagine[d]" Sarah Dean would "swap places with [the jury] real quick." In addition, he argued: "Here we have, according to all the testimony, and I didn't know Mrs. Dean, but I think if I did I'm sure she was a fine person. I did not know her but you heard the testimony from the people that did." Finally, he stated his dislike of Steven Cox.

Each of these arguments was objectionable (and also "easily avoided").[6] However, we find no reasonable probability that their exclusion would have changed the result at the guilt-innocence phase of the trial, even when considered in conjunction with the misstatement of the law dealt with below.

The misstatement occurred when the prosecutor argued as follows: "[T]he judge will charge you, that in malice, malice aforethought, number one, that a person intends the act that he committed. If they do something—if I come and grab the podium and I push it over, I intended to do that, unless it's proven otherwise. If you see me do that you're pretty sure that's what I intended, even though you can't read my mind. So a person commits an act and by that act a person is killed; the completion of that act causes death, that's a sufficient intent ... [T]hat is the intent that the law speaks of as to what did a person think. Did I do that action that I just discussed with you. Don't let that be confusing to you all."

6. "This kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as 'the evidence shows ...' or something similar." ABA Standards for Criminal Justice, supra at 3-89.

This explanation was incorrect. *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, supra. However, the trial court's instructions on intent and malice were correct, and, considered in light of the strength of the evidence, were sufficient to cure the improper impact of the argument.

(i-2) The sentencing phase.

[29] We do not agree with Ford's contention that the prosecutor "unfairly summarized the controversy over the ... death penalty by focusing exclusively on retribution." Although there are other legitimate sentencing concerns, see *Conner v. State*, supra, a prosecutor is under no obligation to argue all of them.

[30-32] The prosecutor did not err by noting the obvious fact that the victim was gone and would never be here again. See *Brooks v. Kemp*, supra at 1409-10. Nor did the prosecutor err by arguing: "[O]ur government has determined that the death penalty is appropriate and necessary in certain cases and should be provided ... It's up to you to decide if this is that type of case that deserves the death penalty." This was a correct statement of the law. His further argument that law and order depended upon the confidence of the citizenry that criminals would receive the punishment they deserved was not improper. See *Conner v. State*, supra at 120, 303 S.E.2d 266 (quoting former U.S. Supreme Court Justice Stewart's plurality and concurring opinions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), respectively).

[33] Finally, the prosecutor committed no impropriety by arguing that the jury was commanded "to do what is right and what is just," by following his discussion of the heinousness of the crime with the dramatic assertion that Sarah Dean would be "in there" with the jury, asking for justice; or by concluding: "By God we draw the line somewhere and this is it folks. Enough is enough and we draw the line. You say it for Sarah Dean, say it for all of us, enough is enough. It's got to stop. Thank you."

We do not, however, find that the prosecutor's argument was devoid of impropriety.

Our major concern is not the brief expression of a personal opinion early in his argument. The effect of this impropriety clearly was inconsequential.

The more serious impropriety occurred when the prosecutor argued as follows:

"If someone wants to forgive Ford, let Sarah Dean forgive him. She is the only one who has the right to do that. She and the Lord. Don't take that right away from her. Say, well that's all right Sarah, I'm going to forgive him for what he did to you. Don't take that away. That would be the worst tragedy we could have in this court for you to do that ...

"God is the only one who can forgive. He and Sarah Dean. Christ said you can turn the other cheek when you are hit but you can't turn the cheek for someone else. The law of God prescribes the law of man and to impose order on society we must have both ...

"Come back with whatever you like. It's your choice. But in fact, as I said before, not only would it be a travesty but a very sick joke against Sarah Dean ..."

[34] It is undoubtedly true that a jury has no right to forgive a defendant. See *Felker v. State*, 252 Ga. 351, 378, 314 S.E.2d 621 (1984). The fact of conviction, however, suffices to ensure that the jury

will not forgive the defendant. At the sentencing phase of the trial the question is not *whether* the defendant will be punished, it is, rather, *how much* he will be punished. Once a statutory aggravating circumstance is established, the issue is not forgiveness, it is mercy. By confusing these two terms, the prosecutor in effect argued that the jury had no right to be merciful. Such an argument is legally incorrect.

[35] "Just as retribution is an appropriate justification for imposing a capital sentence ... [so is] mercy ... an acceptable sentencing rationale." *Drake v. Kemp*, 762 F.2d 1449, 1460 (11th Cir.1985).

[36, 37] A prosecutor is entitled to "urge vigorously that a death sentence is the appropriate punishment in the case at hand ..." *Walker v. State*, 254 Ga. 149, 159, 327 S.E.2d 475 (1985). It follows that he is entitled also to "urge vigorously" that mercy is inappropriate "in the case at hand." To argue, however, that the jury has no *right* to be merciful goes too far, as does the characterization of the exercise of mercy as a "travesty and a sick joke." *Drake v. Kemp*, supra. Cf. ABA Standards for Criminal Justice 3-5.10 ("The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.")

Having identified improprieties in the prosecutor's sentencing argument, we must now determine "whether there was a reasonable probability that the improper arguments changed the jury's exercise of discretion in choosing between life imprisonment or death." *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir.1985).

Examining all the circumstances, we do not find a reasonable probability that, but for the improper argument, Ford would have received a life sentence.

First, as we noted above, the prosecutor had a right to argue that mercy was inappropriate in the case at hand, and much of the prosecutor's argument was devoted to a discussion of facts which supported his contention that the death penalty was called for in this case.

Second, the prosecutor did concede, albeit grudgingly, that the jury had the right to recommend a life sentence, and the defense attorney, for his part, pointed out that he was not asking the jury for forgiveness, excuse, or pardon—he was asking only for something less than a death sentence, and he called the jury's attention to the likelihood that if the jury opted for mercy, Ford could get "four life sentences and twenty years on top of that."

Third, the trial court's instructions informed the jury that it was the latter's responsibility "to determine within the limits prescribed by law the penalty that shall be imposed," explaining that every person found guilty of murder would be "punished by death or by imprisonment for life." The court instructed the jury to consider mitigating circumstances, which the court defined as "those which do not constitute a justification or excuse for the offense of murder, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability so as to justify a sentence of life imprisonment rather than death," and further explained that the jury could provide for a life sentence whether or not it found any mitigating circumstances, "for any reason satisfactory to [the jury], or for no reason."

These countervailing arguments and instructions mitigated to a large degree, if not completely, the impropriety of the prosecutor's argument.

We note that in this case "[t]here was overwhelming evidence of guilt, thus reducing to a minimum the chance that an innocent person will be executed." *Tucker v. Kemp*, 762 F.2d 1496, 1509 (11th Cir. 1985).[7]

Moreover, the jury found that the murder was "outrageously or wantonly vile, horrible or inhuman," and that it was committed during the commission of the additional capital felonies of armed robbery, kidnapping with bodily injury, and rape. See OCGA § 17-10-30(b)(2) and (b)(7). The victim gave Ford no reason to attack her; the crimes were entirely unprovoked, and the murder was preceded by serious physical and psychological abuse. The crime was indeed (as the prosecutor contended) "horrible."

In mitigation, it was shown that Ford had grown up without a father present, had experienced difficulty with his schoolwork, but had never before been in serious trouble. While not frivolous, these mitigating circumstances are hardly "commanding" in the face of the egregiousness of the crime. *Brooks v. Kemp*, supra at 1416. Compare *High v. Zant*, 250 Ga. 693, 694–95, 300 S.E.2d 654 (1983).

"Considered in light of all facts and circumstances of the case, the improper arguments, most of which were mitigated by other arguments and instructions by the court, were 'not sufficient to undermine confidence in the outcome.'" *Brooks v. Kemp*, supra at 1416.

(j) For the foregoing reasons, we find that neither attorney Edge's performance nor the prosecutor's improper argument justifies reversal of Ford's convictions or death sentence.

SENTENCE REVIEW

[38] 9. The jury found that the offense of murder was committed while the defendant was engaged in the commission of the additional capital felonies of rape, kidnapping with bodily injury, and armed robbery. See OCGA § 17-10-30(b)(2). Ford was convicted of these capital felonies at the guilt-innocence phase of the trial. Just as the evidence supports Ford's conviction for these offenses, the evidence supports the jury's findings in regard to the § b(2) aggravating circumstance.

[39] The jury also found that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind." See OCGA § 17-10-30(b)(7). In this case, the victim clearly suffered serious and intentionally-inflicted physical and psychological abuse. She was kidnapped, raped, stuffed into the trunk of her own car, driven around for several hours, hit on the head with a metal road-sign (after pleading for her life), and pushed into a pond (still in the trunk of her car and still conscious), where she drowned. The evidence supports beyond a reasonable doubt the jury's findings of the § b(7) aggravating circumstance. OCGA § 17-10-35(c)(2). Compare *Whittington v. State*, 252 Ga. 168(9 b), 313 S.E.2d 73 (1984); *Phillips v. State*, 250 Ga. 236(6), 297 S.E.2d 217 (1982).

[40] 10. From our review of the record, including matters addressed in Division 8 of this opinion, we find that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(1).

[41] 11. Ford's death sentence is not disproportionate to the life sentence received by co-defendant Steve Cox. See *Allen v. State*, 253 Ga. 390(8), 321 S.E.2d 710 (1984). Aside from the difference in ages (Cox was only 15 at the time of the crime), the evidence tends to show that Ford was the more culpable of the two, i.e., that he and not Cox drove the car, raped the victim, hit her with the road sign, let the car out of gear prior to pushing it into the pond, and got the money.

[42] In addition, Ford's death sentence is neither excessive nor disproportionate to sentences imposed in similar cases generally. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the imposition of the death penalty in this case.

Judgment affirmed.

All the Justices concur.

APPENDIX

Alderman v. State, 254 Ga. 206, 327 S.E.2d 168 (1985); *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984); *Finney v. State*, 253 Ga. 346, 320 S.E.2d 147 (1984);

7. We note in addition that Ford testified at the sentencing phase—admitting the crimes, but asking for mercy.

APPENDIX—Continued

Brown v. State, 250 Ga. 66, 295 S.E.2d 727 (1982); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980); *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980); *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 521 (1978); *Morgan v. State*, 241 Ga. 485, 246 S.E.2d 198 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978).

CITY OF ROSWELL, et al.

v.

DAVIS.

No. 42224.

Supreme Court of Georgia.

Oct. 30, 1985.

Civil rights action was brought against city, chief of police and police officer arising from incident in which officer stopped plaintiff husband and detained him while husband was enroute to hospital with his critically ill wife. The Superior Court, Fulton County, granted city's motion for judgment on the pleadings, and plaintiff appealed. The Supreme Court, 250 Ga. 8, 295 S.E.2d 317, affirmed in part and reversed in part. On remand, the Superior Court, George B. Culpepper, III, J., granted motion for j.n.o.v. and a new trial to chief of police and city, denied plaintiff's motion for attorney fees, and plaintiff appealed. The Court of Appeals, 174 Ga.App. 417, 330 S.E.2d 130, affirmed in part and reversed in part. After granting certiorari, the Supreme Court, Hill, C.J., held that evidence did not establish a "policy" of inadequate police training sufficient to support liability under section 1983.

Reversed.

Smith, J., dissented.

Civil Rights ⇐13.13(3)

Evidence in civil rights action against city, chief of police and police officer arising from incident in which officer stopped plaintiff and detained him while plaintiff was enroute to hospital with his critically ill wife did not establish a "policy" of inadequate police training sufficient to support liability under section 1983; officer legitimately stopped car only to discover that it bore critically ill woman; he then decided that, rather than allow plaintiff to proceed or to transport wife in his patrol car, better course of action was to call for emergency help to render aid and for an ambulance to transport wife to hospital, which was over eight miles away; in addition, officer called a supervising officer to the scene as he had been instructed to do. 42 U.S.C.A. § 1983.

Dennis J. Webb, Brian A. Boyle, Dennis, Corry, Webb & Carlock, Atlanta, for City of Roswell, et al.

Clifford H. Hardwick, Atlanta, for James R. Davis.

HILL, Chief Justice.

This is a civil rights case, involving the alleged inadequate training of a police officer, here on certiorari. *Davis v. Ramey*, 174 Ga.App. 417, 330 S.E.2d 130 (1985). On the morning of May 24, 1980, James Roy Davis was transporting his critically ill wife to the hospital when he was stopped by Roswell police officer Michael Douglas Ramey. Davis subsequently sued officer Ramey, the City of Roswell, and its chief of police, T.L. Joyner, alleging, inter alia, that

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ENUMERATION OF ERROR NUMBER II

APPELLANT WAS DENIED EQUAL PROTECTION, DUE PROCESS OF LAW, A RELIABLE SENTENCING DECISION, AND A REPRESENTATIVE CROSS SECTION OF THE COMMUNITY ON HIS TRIAL AND SENTENCING JURY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Over objection, Appellant was tried by a jury from which nine out of ten possible black jurors were struck through the use of the prosecutors peremptory challenges. It is time for this Court to examine its previous position, particularly in death cases where an individualized decision free of prejudice is supposed to be made, and require that the jury selection procedure be free of bias and discrimination.

In McCray v. New York, ____ U.S. _____, 33 Cr.L. 4067 (82-1381, May 31, 1983) Justice Marshall dissenting from the denial of certiorari declared that the State's use of peremptory challenges in a racially biased manner presented a "significant and recurring question of constitutional law." Swain v. Alabama, 380 U.S. 202 (1965), traditionally relied upon by the State to justify the racially biased use of peremptories has been almost universally condemned. See e.g., Note, "Limiting Peremptory Challenges: Representation of Groups on petit Juries", 86 Yale L.J. 1715 (1977).

Swain was decided on equal protection grounds; but, since Swain was decided before the United States Supreme Court applied the Sixth Amendment guarantees of a fair cross-section of the community on criminal juries to the states through the Fourteenth Amendment, it is no longer a viable basis for sanctioning clearly biased use of peremptories.

The Appellant argues that the racially biased use of peremptory challenges, violates his rights to equal protection, due process, a fair cross section of the community on his trial jury and a reliable sentencing determination in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Taylor v. Louisiana, 419 U.S. 522 (1975); Commonwealth v. Soares, 377 mass. 461, 387 N.E. 2d 499 (1978), Cert. denied, 444 U.S. 881 (1979); People v. Wheeler, 33 Cal. 3rd 258, 148 Cal. rptr. 158, 583, P. 2d 748 (1978); Lockett v. Ohio, 438 U.S. 586 (1978).

In McCray v. Adams, _____ F2d _____ (2nd Cir. Case No. 84-2026 Dec. 1984) the Court held that since peremptory challenges were not a constitutional right a defendant's Sixth Amendment rights took precedence. The Court stated "the notion that all persons who share an attribute, such as skin color, will ipso facto view matters in the same way, and that minority groups are less able than whites to decide the case solely on the basis of the evidence, are both fallacious and pernicious ... we conclude that the Sixth Amendment's guarantee of trial by an impartial jury ... forbids the exercise of peremptory challenges to excuse jurors solely on the basis of racial affiliation."

The Court went on to adopt the Supreme Court's test for the establishment of a prima facie case of a Sixth Amendment violation with respect to the venire, as set forth in Duren v. Missouri, 439 U.S. 357, 364 (1976):

> In order to establish a prima facie case of a Sixth Amendment violation of the fair cross section requirement the defendant must show (1) that the group alleged to be excluded is

> a 'distinctive' group within the community; (2) that the representation of this group in venires is not fair and reasonable ... (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

In Florida v. Neil, 457 So. 2d 481 (Fla. 1984), the Florida Supreme Court recently recognized that the Swain test has "seldom, if ever, been met," Id. at 483, and reversed a conviction obtained in a case where a prosecutor had used his peremptory strikes in a facially biased manner. Although the Florida Court based its decision on the State Constitution, it cited as an authority for its position Taylor v. Louisiana, supra and McCray v. New York, supra. See Florida v. Neil, supra, N.5 at 484.

The test adopted by the Florida Court requires that a party concerned about the other side's use of peremptory challenges, (1) must make a timely objection, (2) demonstate on the record that the challenged persons are members of a distinct racial group and (3) that there is likelihood that they have been challenged solely because of their race.

Whether this Court applies the standards in Duren v. Missouri, supra, or the standards in Florida v. Neil, supra, Appellant is entitled to a new trial. Counsel for Appellant made a timely objection (Trial Trans. p. 270) and showed that the prosecutor had used nine of his ten (90%) peremptories to strike black prospective jurors in a case where there was a white victim and a black defendant. Under either test a presumption arose which was not rebutted by the State.

Because the Appellant was denied due process and a representative cross section of the community on his trial and sentencing jury in violation of the Sixth, Eighth and Fourteenth Amendments he should be given a new trial.

ENUMERATION OF ERROR NUMBER III

APPELLANT'S RIGHT TO DUE PROCESS OF LAW, AN IMPARTIAL TRIAL JUDGE, CONFRONTATION AND A RELAIABLE SENTENCING DETERMINATION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE TRIAL COURT'S COMMENTS ON THE CREDIBILITY OF WITNESS STEVEN COX.

During the testimony of Appellant's alleged accomplice, Steven Cox, the witness testified that he expected to receive a sentence of six years for his part in the crimes. The trial judge told the witness, before the jury, that "you're not going to get any six years". The prosecutor then, through leading questions got the witness to say "yes" to the question "I intend to recommend life plus twenty years on you, that's right, isn't it?" (Trial Trans. P. 407). The Court's comments were volunteered and unquestionably impacted on the credibility the jury assigned to Steven Cox's testimony.

Although the judge is allowed to question a witness, he may not do so in such a way that his credibility is affected, Brundage v. State, 143 Ga. App. 1 (1977); Anderson v. Warden, 696 F2d 296 (4th Cir. 1982), or that shows he has formed an opinion, Perdue v. State, 147 Ga. App. 648 (1978); DeFriese v. State, 232 Ga. 739 (1974); United States v. Martinez, 496 F2d 664, 668 (5th Cir. 1974). The Court is also not allowed to ask questions the tenor of which is prosecutorial. Harkey v. State, 159 Ga. App. 112, 113 (1981).

ORIGINAL

NO. 87-6796

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JAMES A. FORD,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

I.

Whether this Court should grant a writ of certiorari to review the decision of the Supreme Court of Georgia finding that the Petitioner never properly under Georgia law factually or procedurally raised a claim in the trial court challenging the prosecutor's use of peremptory challenges pursuant to Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986)?

LIST OF PARTIES

1. Petitioner James A. Ford, presently under a sentence of death pursuant to the judgment of the Superior Court of Coweta County, Georgia.
2. The State of Georgia, Respondent and prosecutor in the instant case.

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OPINIONS BELOW

Petitioner seeks review by writ of certiorari of an opinion of the Supreme Court of Georgia issued on November 30, 1987, rehearing denied February 15, 1988, affirming the Petitioner's conviction and sentence after a remand of the case from this Court. Ford v. State, 257 Ga. 661, ___ S.E.2d ___ (1987).

PART ONE

STATEMENT OF THE CASE

Petitioner, James A. Ford, on October 24, 1984, was found guilty of the kidnapping, armed robbery, rape and malice murder of Sarah Dean, as well as of the burglary of the J & L Oil Company in Coweta County, Georgia. After the sentencing phase of Petitioner's trial, the jury found the existence of four statutory aggravating circumstances under Georgia law and recommended that the Petitioner be sentenced to death. In accordance with this recommendation, the trial judge imposed this sentence and the Petitioner appealed his convictions and sentences to the Supreme Court of Georgia, which affirmed the judgment of the trial court on October 29, 1985. Ford v. State, 255 Ga. 81, 355 S.E.2d 567 (1985).

As the Petitioner had raised allegations regarding the prosecutor's use of peremptory strikes, the Petitioner's first petition for writ of certiorari to this Court was granted. Ford v. Georgia, ___ U.S. ___, 107 S. Ct. 1268 (1987). The judgment of the Supreme Court of Georgia was vacated and this case was remanded to the Supreme Court of Georgia for further consideration of the case in light of Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. 708 (1987). Ford v. Georgia, supra.

On November 30, 1987, the Supreme Court of Georgia issued its decision regarding the case on remand, finding that the Petitioner at trial had never factually raised a claim of the type discussed in Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986), and that the Petitioner's subsequent attempt to raise a Batson-type claim was procedurally defaulted under Georgia law. Ford v. State, 257 Ga. 661, ___ S.E.2d ___, (1987).

The Petitioner now seeks a petition for writ of certiorari to review this decision by the Supreme Court of Georgia. Further facts will be developed herein as is necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASON FOR DENYING THE WRIT

A. THERE IS NO FEDERAL QUESTION PRESENTED HERE AS THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED AS A MATTER OF STATE LAW THAT THE PETITIONER HAD PROCEDURALLY DEFAULTED IN HIS CHALLENGE TO THE PROSECUTOR'S PEREMPTORY STRIKES IN THE PETITIONER'S CASE.

In this petition, the Petitioner alleges that this Court should grant a writ of certiorari to review a decision of the Supreme Court of Georgia finding that the Petitioner had, under state law, procedurally defaulted in his challenge to the prosecutor's use of peremptory challenges in the Petitioner's case. Respondent avers that the Supreme Court of Georgia in its application of state law properly determined that the Petitioner's claim was procedurally defaulted and therefore there is no federal question presented for the review of this Court in the instant case.

The facts surrounding the Petitioner's procedural default upon his claim pursuant to Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986), were noted by the Supreme Court of Georgia in its decision reaffirming the Petitioner's conviction, after remand from this Court. Ford v. State, 257 Ga. 661, ___ S.E.2d ___ (1987). On October 9, 1984, two weeks prior to the Petitioner's trial, the Petitioner filed a "motion to restrict racial use of peremptory challenges." Ford at 661-62 n. 1. In this brief motion, the Petitioner alleged that the prosecutor would, in his subsequent selection of a jury, exercise his peremptory challenges in a manner consistent with

a historic pattern of discrimination against blacks. Id. Therefore, the Petitioner requested that the trial court issue an order forbidding such actions by the prosecutor, in effect, requesting preliminary injunctive relief from the trial court on this issue. Id. The trial court denied this order. Id. at 662(4a).

Subsequently, on October 12, 1984, a pre-trial evidentiary hearing was held regarding the Petitioner's request for injunctive relief in the form of a court order. (10/12/84, H.T. 160-63). At this evidentiary hearing, the Petitioner's counsel stated in support of his request:

> Your Honor, in so far as evidence goes, I would just like to state in my place that its' (sic) been my experience, and the Court is aware that the district attorney and other assistant district attorneys have a history and a pattern when you have a defendant who is black, of using their per-emptory (sic) challenges to excuse potential jurors who are also black. We are requesting the Court to require the district attorney, if he does use his per-emptory (sic) challenges to excuse potential black jurors, to justify on the record the reason for his excusing them. His failure to do so we feel would evidence the fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.

Id. at 160-61.

The trial court subsequently denied this motion. Ford v. State, 257 Ga. at 662(4a).

On October 22, 1984, ten days after the hearing on the Petitioner's motion, the Petitioner went to trial. Extensive voir dire was conducted of the potential jurors. (T. 7-159). The jury was then struck. (T. 166). As the Supreme Court of Georgia factually noted, after the jury in the Petitioner's case was selected, no objection was raised as to the prosecutor's use of his peremptory strikes. (T. 166-70). When the trial court specifically asked Petitioner's counsel, "Mr. Edge, do you know of anything we need to take up?", Petitioner's counsel replied, "Your Honor, I don't think so . . . Yes, sir, we are ready." (T. 170).

When the issue of the prosecutor's peremptory challenges was next raised at trial, it was not raised by the Petitioner. (T. 270-71). Instead, at the noon recess on the second day of the Petitioner's trial, the trial court noted that the Petitioner had previously made a motion regarding the prosecutor's peremptory challenges and the trial court wished to clarify the record. Id. The trial court then proceeded to state factually what had occurred during the prosecutor's use of his strikes because, the court explained, "I just think that needs to be put in since that motion was made." (T. 271). This conference conducted after the beginning of the trial was not at the Petitioner's instigation or insistance in the form of an objection, but instead was an act of record-keeping on the part of the trial court.

In reviewing this factual scenario, the Supreme Court of Georgia made the following determinations. Initially, the Court noted that the Petitioner's original motion regarding the prosecutor's peremptory challenges was based on the law as it existed at the time under Swain v. Alabama, 380 U.S. 202 (1965), that is, that the Petitioner must show a pattern of systematic and historic exclusion of black jurors in criminal

trials within the circuit. Ford v. State, 257 Ga. at 661-62(4). After this motion was denied, and the Petitioner proceeded to trial wherein the prosecutor actually exercised his peremptory challenges, the Petitioner then made no contemporaneous objection to the composition of his jury as selected or to the actual exercise of the peremptory challenges. Id. at 663 (6b).

The Petitioner's original direct appeal had been affirmed by the Supreme Court of Georgia on October 29, 1985. Ford v. State, 255 Ga. 81, 96, 335 S.E.2d 567 (1985). The Petitioner had on direct appeal raised his Swain claim. Id. at 83(1). Subsequently, on April 30, 1986, this Court decided the case of Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986). Thereafter, the Supreme Court of Georgia recognized that this Court's decision in Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. 708 (1987), would provide a criminal defendant an opportunity to challenge the prosecutor's use of peremptory challenges in the defendant's own case if the case were on appeal or not yet final. However, the court also noted:

> But nothing in Griffith would warrant the extension of relief upon grounds never raised at trial. Indeed, all that Griffith dictates is that objections made - at trial - must be resolved under the Batson rule, whether or not they antedated the enunciation of that rule. (Note omitted) (Emphasis in original).

Ford v. State, 257 Ga. at 662(5).

As such, the Supreme Court of Georgia determined that the Petitioner's anticipatory motion seeking an order to prevent the prosecutor from allegedly misusing his peremptory

challenges in accordance with an alleged systematic pattern of discrimination could not be interpreted as the same claim challenging the prosecutor's actual use of peremptory challenges in the Petitioner's own case. See Ford at 662(5). Instead, the Supreme Court of Georgia determined that the Petitioner should have, after the prosecutor's use of his peremptory challenges and prior to the commencement of his trial, raised an objection to the actual use of the peremptory challenges in his case. Id. at 663-64(7, 8). The Petitioner's failure to have raised this claim was determined to have been a procedural default under Georgia law, and as the Petitioner had failed to show both cause and prejudice for his procedural default, the court declined to rule upon the Petitioner's Batson-type claim on its merits. Id.

Respondent notes that this interpretation of Georgia law involves no federal constitutional principle. As such, this Court has consistently adhered to a self-imposed principle that it will not review a state court judgment based upon an adequate and independent state ground, even if a federal question were involved or had been improperly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908), Fox Film Corporation v. Muller, 296 U.S. 207 (1935). In explanation of this policy, this Court has stated:

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our

> power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after it corrected its use of federal laws, our review would amount to nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 566 (1977).

This Court has also noted that the Due Process Clause of the Fourteenth Amendment does not establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. Spencer v. Texas, 385 U.S. 584, 563-64 (1967).

In the instant case, the application of the state procedural rule requiring a contemporaneous objection to the prosecutor's use of his peremptory challenges is appropriate and does not implicate any federal constitutional principle. While the Petitioner now pleads that the Supreme Court of Georgia did not specifically announce such a procedural rule until later decisions, Respondent submits that this did not relieve the Petitioner of the responsibility of preserving his claim. This situation can be directly analogized to that where a decision on a motion for change of venue has been deferred until the conduct of the actual voir dire of the jury, so that it can be determined whether such a change of venue would be necessary. In such a situation, once the voir dire had been completed, it would be incumbant on a criminal defendant at that time to renew his motion for a change of venue, provided that the voir dire actually supported

the need for such an action. This is not a novel principle of law to require a defendant to make such a preservation of an issue.

In the instant case, the record is devoid of any showing that the Petitioner was in fact unhappy with the actual trial jury selected in his case. The record does not demonstrate whether the Petitioner could have been satisfied with the selection of this particular trial jury, regardless of its racial composition, so that the Petitioner could have deliberately chosen to forego the preservation of a Batson-type issue. Given the posture of the record in this case, it was appropriate for the Supreme Court of Georgia to decide that the Petitioner's claim in this case was procedurally defaulted.

The Supreme Court of Georgia also properly determined that the Petitioner had not preserved a Batson-type claim by having previously raised an allegation pursuant to Swain v. Alabama, supra. The Petitioner's initial motion claimed that the prosecutor historically and systematically discriminated against blacks, and therefore, there was the possibility that the prosecutor would do the same in the instant case. However, in order to preserve his Batson claim in the instant case, the Petitioner would have to have alleged, after the selection of the jury, that the prosecutor in the exercise of his peremptory challenges did in fact discriminate against those particular jurors in this case. The Petitioner failed to do so. The Supreme Court of Georgia refused to permit the Petitioner to "bootstrap" this new Batson-type claim in this factual situation. Respondent also notes that, contrary to the Petitioner's position, this Court has in effect recognized that Batson presents a new issue for review of this Court by deciding that the Batson claim cannot be retroactively applied beyond those cases on direct appeal when Batson itself was decided. Griffith v. Kentucky, supra at 716; Allen v. Hardy, 476 U.S. ___, 106 S.Ct. 2878 (1986). As such, the Petitioner's raising of the Swain claim did not present the same issue as a Batson claim and fails to excuse the Petitioner from his procedural default under Georgia law.

Finally, Respondent notes that the Petitioner urges this Court grant certiorari in this case because of the pendency of Teague v. Lane, ___ U.S. ___, 42 Cr.L. 4197 (1988) in which this Court will have the opportunity to address the application of the Sixth Amendment in the context of a Batson-type challenge. However, Respondent submits that the pendency of Teague v. Lane, supra, should not affect the disposition of this case for the following reasons. If this Court determines that a petition for certiorari is not warranted because the Supreme Court of Georgia has properly applied state law in this context, the Petitioner's Batson-type claim is procedurally defaulted and this would include any portion of the claim which might be similar to that raised in Teague. If the Petitioner were to prevail upon this petition for certiorari, and Batson is found applicable to Petitioner's case, then a remand to the trial court would be necessary for further evidentiary development, regardless of the disposition of Teague. As such, Teague would present no basis for the granting of a petition for certiorari in this case.

CONCLUSION

Therefore, this Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that there is no federal question for review by this Court as to the Petitioner's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 16th day of May, 1988.

Dennis R. Dunn
DENNIS R. DUNN
Assistant Attorney General

(5)

No. 87-6796

In The

Supreme Court of the United States

October Term, 1990

JAMES A. FORD,

Petitioner,

v.

GEORGIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed April 15, 1988
Certiorari granted April 23, 1990

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RELEVANT DOCKET ENTRIES

Chronology of Relevant Events

9/5/84	Indicted.
10/9/84	Motion to Restrict Racial Use of Peremptory Challenges filed.
10/12/84	Motion to Restrict Racial Use denied.
10/22/84	Jury selection.
10/23/84	Trial.
10/23/84	*In Camera* argument on motion "to the state's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck."
10/25/84	Mr. Ford was found guilty and sentenced to death.
11/26/84	Motion for a new trial filed.
1/7/85	Amended motion for a new trial filed.
1/18/85	Argument on the motion for a new trial.
2/19/85	Motion for a new trial was denied.
3/14/85	Notice of appeal filed in the Georgia Supreme Court.
6/4/85	Oral argument.
10/29/85	Georgia Supreme Court affirmed death sentence.
2/23/87	Order of the Supreme Court of the United States vacating & remanding to the Georgia Supreme Court for further consideration in light of *Griffith v. Kentucky*.

11/30/87 Order of Georgia Supreme Court affirming death sentence.

12/16/87 Rehearing denied, Georgia Supreme Court.

IN THE SUPERIOR COURT OF COWETA COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
Plaintiff,	)	INDICTMENT
	)	NO. 4862
VS.	)	filed
JAMES FORD,	)	October 9, 1984
	)	
Defendant.	)	

MOTION TO RESTRICT RACIAL USE OF PEREMPTORY CHALLENGES

Now comes JAMES FORD, the Defendant in the above styled action, and moves the Court to restrict the Prosecution from using its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the Jury. In support of this Motion, the Defendant shows:

1.

The Prosecutor has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race.

2.

This case involves a black accused and the victim is a member of the white race.

3.

It is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes.

4.

The exclusion of members of the black race in the Jury when a black accused is being tried is done in order that the accused will receive excessive punishment if found guilty, or to inject racial prejudice into the fact finding process of the jury. See McCray vs. New York, ___ U.S. ___, 33 Cr. L. 4067 (82-1381, May 31, 1983). Taylor vs. Louisana (sic), 419 U.S. 522 (1975).

WHEREFORE, the Defendant prays that this Court enter an Order granting the relief requested herein.

WOOD, ODOM & EDGE, P.A.

BY: Arthur B. Edge, IV
Attorney for Defendant
P.O. Drawer 1608
Newnan, Georgia 30264
Phone # 253-9885

Motion Denied
10/12/84
WFL

IN THE SUPERIOR COURT OF COWETA COUNTY
STATE OF GEORGIA

(Caption Omitted In Printing)

filed November 26, 1984

MOTION FOR NEW TRIAL

Verdict and judgment for the State at the Present Term, of the Superior Court of Coweta County, State of Georgia, on October 25, 1984.

The defendant being dissatisfied with the verdict and judgment in said case, and within thirty (30) days from said trial, moves the court for a new trial upon the following grounds, to wit:

1. Because the verdict is contrary to evidence and without evidence to support it.

2. Because the verdict is decidedly and strongly against the weight of the evidence.

3. Because the verdict is contrary to law and the principles of justice and equity.

4. Defendant specifically moves the Court to allow him to reserve the right to amend this motion for a new trial after the transcript has been completed, and the Defendant and his attorney have had a reasonable amount of time to review the transcript and urge such error as may be reflected to the Court.

WHEREUPON the defendant prays that these grounds for a new trial, be inquired of by the Court and that a new trial be granted.

/s/ Nelson Jarnagin
NELSON JARNAGIN
Attorney for Defendant

IN THE SUPERIOR COURT OF COWETA COUNTY
STATE OF GEORGIA

(Caption Omitted In Printing)

filed January 7, 1985

AMENDMENT TO MOTION FOR NEW TRIAL

COMES NOW JAMES FORD the defendant above-named, by and through undersigned counsel, and amends his previously filed Motion for New Trial by adding the following grounds:

1.

The trial court erred in denying the relief requested in defendant's pre-trial motions; specifically the following motions:

(a) For individually sequestered voir dire;

(b) For additional peremptory challenges;

(c) To strike and quash the Georgia death penalty statutes;

(d) To strike and quash the death qualification voir dire;

(e) To suppress the defendant's statements; and

(f) For a change of venue.

2.

Defendant's right to an impartial jury as guaranteed by Sixth Amendment to the United States Constitution

was violated by the prosecutor's exercise of his peremptory challenges on a racial basis.

3.

Defendant was denied due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution by the trial court's impermissible comments during the course of defendant's trial.

4.

Defendant was denied due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution by the prosecutor's impermissible argument in the penalty phase of defendant's trial.

5.

Defendant's trial counsel did not render reasonably effective assistance during his trial in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

WHEREFORE, defendant prays that these his grounds for a new trial, be inquired of by the Court and that a new trial be granted.

HARVEY AND JARNAGIN

By: /s/ Bruce S. Harvey
BRUCE S. HARVEY
Attorney for Defendant

IN THE SUPERIOR COURT OF COWETA COUNTY
STATE OF GEORGIA

(Caption Omitted In Printing)

ORDER

The Defendant's Motion for New Trial having come on for consideration and having been heard, it is hereby CONSIDERED, ORDERED and ADJUDGED:

That the Defendant's Motion for New Trial is hereby denied on each and every ground.

SO ORDERED this 19th day of February, 1985.

/s/ William F. Lee, Jr.
WILLIAM F. LEE, JR.
JUDGE SUPERIOR COURT
COWETA JUDICIAL
CIRCUIT

IN THE SUPERIOR COURT FOR THE
COUNTY OF COWETA
STATE OF GEORGIA

(Caption Omitted In Printing)

EXTRACT OF TRANSCRIPT OF MOTION TO RESTRICT RACIAL USE OF PEREMPTORY CHALLENGES
(October 12, 1984)

* * * *

[160] Now in the area of jury selection there's still the question of the motion to restrict racial use of per-emptory challenges. Mr. Edge, I have read the motion and will now hear your argument on it.

MR. EDGE: Your Honor, in so far as evidence goes, I just would like to state in my place that it's been my [161] experience, and the Court is aware that the district attorney and the other assistant district attorneys have a history and a pattern when you have a defendant who is black, of using their per-emptory challenges to excuse potential jurors who are also black. We are requesting the Court to require the district attorney, if he does use his per-emptory challenges to excuse potential black jurors, to justify on the record the reason for his excusing them. His failure to do so we feel would evidence the fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.

THE COURT: Any response, Mr. Sullivan?

MR. SULLIVAN: As Mr. Edge also stated in his place what he stated; I would like to point out that he cannot state in his place why the district attorney may have struck a juror who happened to be black. He doesn't

know whether this was because of his occupation or whether or not they sometimes have even raised their hands and appear unable to hear and things like that. I can state in my place and I think Mr. Edge would agree with me, that in practically every trial we have in this county there are always blacks on trial juries, and an all white jury is rare in any county. I'd like to point out for the record that Mr. Edge has twenty strikes and the State has ten and he noticed from an earlier motion there is a proper percentage of blacks in the jury box. I would point out to the Court [162] the case of Swain versus Alabama which I'm sure the Court is familiar with at 380 U.S. 202, which is a Supreme Court case that says, the per-emptory challenge system goes back to the common law and it would be an unreasonable burden to require an attorney for either side to justify his use of per-emptory challenges; as in fact the purpose of per-emptory challenges enables either lawyer to strike somebody because they have blue eyes. If this is the particular reason he wants to do that today, I would appose (sic) the motion, and I must object to the statement that was made too.

THE COURT: I will just state for the record that in almost every, I would say almost ninety percent, of the felony cases tried in the circuit I have a jury list before me and I follow along to see which side and who is striking who, and I can't sit here and tell you the number, but I would say in numerous or several cases I've seen cases in which there are, have been black defendants and the district attorney's office has struck perspective (sic) white jurors and left perspective (sic) black jurors on the jury. I have seen that happen here and in other counties in the circuit. I have seen also, not only when there are black

defendants like in this particular case, but I have seen it done and I can't sit here and document them and I have not documented them, but it's been on more than one occasion. I have seen it done as much as several occasions. I don't know why. May be it just happens because the person struck was just [162] real sorry or for one reason or another. I don't know, but I have seen that take place and I'm taking that into consideration among other things and denying the motion to restrict racial use of per-emptory challenges.

Now that takes care of the motions that have been made in connection with the jury selection process. I don't mean by the jury commission, I mean during the actual trial itself.

* * * *

IN THE SUPERIOR COURT FOR THE
COUNTY OF COWETA
STATE OF GEORGIA

(Caption Omitted In Printing)

EXTRACT OF TRANSCRIPT OF THE PROCEEDINGS
DISCUSSING JURY SELECTION
(October 22, 1984)

* * * *

[166] (After a brief recess the selection of a jury began.)

THE COURT: We'll now proceed to strike a jury. We'll strike by numbers, first on the State and then on the defendant.

(Whereupon the selection of a jury began until a jury was struck and then an alternate was picked and the jury was sworn by the Court.)

* * * *

[167] THE COURT: All right. Mr. Bailiff, bring the jurors out.

(Whereupon the jury entered the Courtroom.)

THE COURT: Now what I would like to do is this, ladies and gentlemen. There are twelve of you ladies and gentlemen who have been selected as jurors to try this case and one of you ladies and gentlemen who has been selected as an alternate juror to try the case. The alternate being Ms. Tyree whom we are not going to treat as a second class citizen. You are here to try the case only if something happens to another juror that renders them unable to do so. I would think it would be a good idea if you would be seated in the same seat every single day. What I would suggest and what I would like to have done is let you sit in the far seat there and you all could just move on down. Now you other ladies and gentlemen, whether you sit in the same seat or not, there is no law about that. That's just up to you.

* * * *

[170] I appreciate your coming and your willingness to serve as jurors in this case. Again I emphasize that this is being done because the law requires it and this is a death penalty case. I will do everything I can to make your service such as you will be inconvenienced as little as possible. Would you please go to the jury room at this time and from there you will (sic) excused and transported to the Holiday Inn. One more thing, we're going

to have juror badges that we'd like for you to wear while you are serving as jurors in this particular case. It helps us to be able to identify the jurors and I wish you would please wear them here and about the Courtroom and while you're eating and while you're at the Holiday Inn. Although we have made arrangements to have you eat in private areas I think it's good that everyone knows that you are jurors. Please give these badges out to these jurors and please wear these badges while you are serving as jurors in this case. It would help us all very much.

Mr. Edge, do you know of anything we need to take up?

MR. EDGE: Your Honor, I don't think so.

THE COURT: You'll be ready to try the case tomorrow morning at nine o'clock?

MR. EDGE: Yes, sir, we're ready.

[171] THE COURT: As you will, Mr. Mallory.

MR. MALLORY: Yes, Your Honor.

THE COURT: Can you think of anything else we need to take up now?

MR. MALLORY: No, sir.

THE COURT: There being no further business we'll recess this Court until 9:00 o'clock tomorrow morning. You may go the jury room, ladies and gentlemen.

* * * *

TRIAL IN CHIEF

October 23rd, 1984

* * * *

[268] THE COURT: Let the record reflect that we are here in Chambers to discuss a matter that's come to the [269] Court's attention. . . .

* * * *

[270] THE COURT: One other matter we need to take up. One of Mr. Edge's motions was to the State's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck. I think the record should reflect that of the strikes the State used, it did not strike all the blacks. There's a black on the jury.

MR. EDGE: Yes, sir, and if I'm not mistaken, according to my count, the State used nine of its ten peremptory challenges to strike blacks.

THE COURT: That's what the record reflects and I think of its ten that were used, one black that they did not strike is on the jury. And there was a black alternate person that could have been an alternate juror and the State did not strike that one, they struck another one, a white prospective alternate juror first, and that particular black [271] alternate was struck by you.

MR. EDGE: Yes, sir.

THE COURT: Leaving a white alternate juror.

MR. EDGE: Yes, sir.

THE COURT: That's what happened in the jury selection process. I just think that needs to be put in since

that motion was made. Of course, the motion has been denied. It doesn't matter now but I think just for the record's sake that ought to be done. You all can go in and set up and we'll be ready to go shortly.

MR. MALLORY: Your Honor, does the Court believe it would be appropriate for the State to make any kind of showing as to why those challenges were used?

THE COURT: I'm not asking for it. I'm not asking for such a showing to be made. We'll go in now.

* * * *

IN THE SUPERIOR COURT FOR THE COUNTY OF COWETA
STATE OF GEORGIA

(Caption Omitted In Printing)

* * * *

Extract of hearing on motion for new trial
January 18, 1985

* * * *

[31] MR. JARNAGIN: All right, Your Honor, at this time if the Court will allow us to take up the issues in the motion.

THE COURT: Sure. You want me to look at your ammendment?

MR. JARNAGIN: Yes. The ammendment (sic) to the second paragraph. The defendant's right to an impartial jury trial as guaranteed by the Sixth Ammendment (sic) to the United States Constitution was violated by the prosecutor's exercise of his premptory (sic) challanges (sic) on a racial basis. On that point, Your Honor, we are relying on two references that appear in the record of the transcript of the trial. One, at pages 161, 162. That's one reference. Those two pages 161, 162. And the other [32] is on page 270 and 271 more specifically, that is, in the trial transcript, Mr. Edge had objected to the use of premptory (sic) challenges by the district attorney on the basis that he was excusing black people on a basis of racial bias alone and he pointed out to the Court there and it was admitted by the State that they – well at this point he moved that they justify for the record the reason for excusing black people from the jury. And there stated his

objection, saying his failure to do so we feel would evidence the fact he is using them in a discriminatory manner. That is, excusing jurors solely because they are black and for no other reason. To that Mr. Sullivan on page 161 of the transcript responded. I would like to point out that he cannot state in his place why the district attorney may have struck a juror who happened to be black. He goes on there to argue, and it is in the record.

THE COURT: Yes, I'm following you.

MR. JARNAGIN: So there was argument but there was no showing. At that point the Court then had an observation contained in the record. It's on page 162 beginning at line 11 going down through 25. The period in the first part of line 25 where the Court essentially resolves the issue at that point in the trial. Then going on to page 270, 271 of the trial transcript, again Mr. Edge re-asserts this objection. And the Court there saying, one other matter we need to take up. One of Mr. Edge's motions was that, the State using all [33] their strikes to take blacks from the jury. No whites being struck, all blacks being struck. I think the record should reflect that of the strikes the State used it did not strike all blacks. And there it stated, the State used none of its ten premptory (sic) strikes to take blacks off the jury. So it was that fact –

THE COURT: There was a black alternate too.

MR. JARNAGIN: Yes, a black alternate on the jury.

THE COURT: As well as a black juror.

MR. JARNAGIN: Yes, I know. There was one.

THE COURT: As well as an alternate.

MR. JARNAGIN: And a black alternate yes, sir. Under the decision of *McCrae versus Abrahms*, which is a Second Circuit opinion, December 4th, 1984. It's published in 36 Criminal Law Reporter.

THE COURT: Excuse me. There were examples in the State though, in which the State did not strike a black person and the defendant did strike a black person.

MR. JARNAGIN: Well that may be reflected in the record. That's not a portion of –

THE COURT: That happened as a matter of fact, from my memory. I haven't read the entire transcript. That did happen as a fact in the trial of the case.

MR. JARNAGIN: Well whether it did or did not [34] is not a part of my –

THE COURT: I'm sure that's not part of your motion because that's not helpful to you, so you're not going to bring out anything that's not helpful to you.

MR. JARNAGIN: Well I don't think it hurts anything but that's not the point. The point that I'm trying to make on that issue is that under this new decision of *McCrae versus Abrahms*, which I'm arguing is persuasive; it's not controlling in this State. However, it is a re-assestment (sic) by the *Second Federal Circuit Court* of the older standard *in Swain versus Alabama*. And in the *McCrae* decision, there, they state that once the defendant is able to show that there is a pattern of using the premptory (sic) strikes to show – to strike people who are in an excludable cognascible (sic) group and there is a substantial liklihood (sic) that using these challenges against a cognascible (sic) group would deprive the defendant of a

cross section of the community, once they make this prima facie showing, then the burden shifts to the State to show that they're not using the strikes in a discriminatory fashion. And what we're seeing here is, that is a change in the law and that we believe that decision shifted the burden at that time from the defendant to the State to justify their discriminatory use of premptory (sic) strikes. So we rely on that decision and on the --

THE COURT: What Circuit is that?

MR. JARNAGIN: Second Circuit.

[35] THE COURT: Do you have a copy of the decision?

MR. JARNAGIN: Yes, I have one if you'd like it.

MR. MALLORY: Would you read that?

MR. JARNAGIN: Well, it just got away from me.

MR. MALLORY: *36 Criminal Law Reporter.*

THE COURT: Number 12.

Okay, do you want to respond, Mr. Mallory?

MR. MALLORY: Very briefly, Your Honor, and I will of course furnish the Court with a copy of this case. It's *Willis versus The State,* which is the present Georgia law in this matter of jurisdiction, which simply states that the Georgia Statute provides that premptory (sic) challenges are within the discretion of the district attorney, and that statute has not been overturned or challenged or ruled un-Constitutional. I'll submit that to the Court.

THE COURT: All right. Go ahead. I'm familiar with that case. I'm not going to rule on them individually. You just go ahead and I'll either grant your motion for a new trial or will not, when you finish.

* * * *

Supreme Court of Georgia.

255 Ga. 81

FORD

v.

The STATE.

No. 42154.

Oct. 29, 1985.

* * * *

SMITH, Justice.

This is a death penalty case. Appellant, James A. Ford was convicted in Coweta County of armed, robbery, rape, kidnapping with bodily injury, burglary, and murder. The case is here on direct appeal, for review under the Unified Appeal Procedure (252 Ga. A-13 et seq.), and for the sentence review required by OCGA § 17-10-35.[1] We affirm.

FACTS

The victim, Sarah Dean, managed the J & L gas station in Newnan. She usually began work at 6:00 a.m. Shortly after 5:00 a.m. on March 1, 1984, a burglar alarm went off at the station. Police responding to the call found

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[1] The jury returned its verdict as to sentence on October 25, 1984. A motion for new trial was filed November 26, 1984, amended on January 7, 1985, heard January 18, 1985, and denied February 19, 1985. A notice of appeal was filed March 14, 1985, and the record was docketed in this court on March 29, 1985. The case was orally argued June 4, 1985.

the front door unlocked but nothing else out of the ordinary; however, attempts to contact Mrs. Dean were unsuccessful. Pending the arrival of the district supervisor from Marietta, the door was re-locked and the police left.

Soon afterwards, an employee of a neighboring business observed a small black male exiting J & L by a window, and contacted the police. Acting on information obtained from his mother, police questioned Steve Cox, who was found to be in possession of keys to the J & L station. Cox implicated Ford, and, shortly before 2:00 p.m., a warrant was obtained for the latter's arrest.

At approximately 3:00 p.m., Sarah Dean's automobile was located, submerged to its roof in a pond. After pulling the car out with a wrecker, police used the keys (which were in the ignition) to open the trunk, where they discovered the body of Sarah Dean.

Three hours later, Ford was arrested, after a high-speed automobile chase. He was found to be in possession of over $2000.

Ford subsequently gave a written confession, which can be summarized as follows: He and Steve Cox, having decided to get some money to pay a fine, arrived at J & L just as the victim was preparing to leave, and forced their way into her car. Ford drove to a secluded area, where they undressed the victim and "had sex" with her. Afterwards, they put her in the trunk and drove around – buying marijuana with money they found in the victim's purse; driving to Atlanta, where Ford visited a girlfriend; and returning to Newnan, where they spent an hour in a tavern. Next they drove to a more secluded area. Ford

opened the trunk and hit the victim on the head with a road sign. Finally, they pushed the car into a pond (with the victim still in the trunk). After disposing of the victim, the two returned to J & L on foot and used the victim's keys to enter the station. Ford got "a large amount of money out of the cabinet," and left by the front door when the police arrived.

Cox testified at trial. His testimony was generally consistent with Ford's confession except he claimed that only Ford raped the victim. In addition, he testified that when they first entered the victim's car, Ford held a butcher knife to the victim's neck; that Ford threatened to kill the victim during the rape and again while they were at the tavern; that Ford responded to the victim's plea for mercy by telling her to "shut up;" and that as the car rolled into the pond, Cox could hear the victim beating on the truck-lid.

Ricky Wright testified that on the morning of March 1 he and Ford went shopping in Atlanta. En route, Ford admitted to Wright that he had burglarized J & L, raped the woman who managed it, put her in the trunk of her car and pushed the car into a pond. According to Wright, Ford was laughing and smiling as he described the crime. Wright testified that Ford had a large sum of money and gave Wright $150.

An autopsy established that the victim had drowned. Serological examination of vaginal swabbings positively established that sexual intercourse has recently occurred. Hairs found on the victim were consistent with having come from Ford (and inconsistent with having come from Cox).

The evidence overwhelmingly establishes Ford's guilt, and, therefore, more than suffices to meet the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

ENUMERATIONS OF ERROR

1. In his 2nd enumeration, Ford contends that the prosecutor's use of peremptory strikes to remove 9 of 10 possible black jurors denied Ford his right to a jury comprised of a fair cross-section of the community. (One black served on the jury.) Ford has shown only that a large percentage – but not all – of black prospective jurors were peremptorily struck by the prosecution in *this* case. "He has failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit." *Moore v. State*, 254 Ga. 525, 529(2(b)), 330 S.E.2d 717 (1985). Accordingly, we find no error here.

2. Prior to trial, the state reached an agreement with Steve Cox whereby, in exchange for his truthful testimony, he would be prosecuted only for armed robbery and burglary and the state would recommend "life plus 20," or, in other words, the maximum sentences for these crimes. The state, of course, was constitutionally required to and did reveal this information to Ford. *Owens v. State*, 251 Ga. 313(1), 305 S.E.2d 102 (1983).

When Cox testified, the state lost no time in addressing this subject. When the state asked Cox what sentence he was going to get, Cox answered. "Six years." As the state prepared to refresh his recollection, the court interrupted to state: "Let me tell you right here and now

you're not going to get any six years, do you understand that?" The state then proceeded to establish Cox's understanding that the recommended sentence was going to be life plus 20 years, and not 6 years.

In his 3rd enumeration of error, Ford contends that the court's comment was an improper expression of opinion. See OCGA § 17-8-57.[2] We need not determine whether this code section actually was violated, inasmuch as Ford neither objected nor moved for a mistrial. *State v. Griffin*, 240 Ga. 470, 241 S.E.2d 230 (1978). We note, however, that Ford does not, even now, contest the truth of the court's comment, see *Abbott v. State*, 91 Ga.App. 380(3), 85 S.E.2d 615 (1955), or contend otherwise than that regardless of the courts comment, the state had a constitutional duty to correct Cox's misconception, see *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and if, as a result, Cox's credibility was adversely affected, Ford plainly was benefited thereby.

3. The trial court did not abuse its discretion by denying Ford's motion for sequestered voir dire. *Finney v. State*, 253 Ga. 346(2), 320 S.E.2d 147 (1984). Enumeration 5 is without merit.

4. Regarding Ford's 6th enumeration, we find that the trial court did not err by refusing to grant Ford extra

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[2] OCGA § 17-8-57 provides: "It is error for any judge in any criminal case, during its progress or in his charge to the jury, to express his opinion as to what has or has not been proved or as to the guilt of the accused . . . "

peremptory strikes, in addition to the 20 authorized by OCGA § 15-12-165.

5. Enumeration 7 complains of the trial court's refusal to change venue. Although almost all of the prospective jurors had heard at least something about the case, in view of the limited amount of prejudicial pre-trial publicity shown in this case, and the low percentage of veniremen excused for bias, prejudice or fixed opinion (5 of 60 or 8%),[3] the trial court did not err. *Devier v. State*, 253 Ga. 604(4), 323 S.E.2d 150 (1984); *Waters v. State*, 248 Ga. 355(1), 283 S.E.2d 238 (1981).

6. After his arrest. Ford gave two statements. The trial court excluded the second statement but ruled that the first statement was voluntary and admissible.[4] In his 8th enumeration, Ford complains of the court's refusal to exclude the first statement.

Ford was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and signed a form waiving those rights after officers read the form and explained each portion of the form as they went along. In view of the lack of any evidence of threats

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[3] In addition, 5 jurors who underwent voir dire were excused for prejudice or bias for or against the death penalty, and one was excused because she had served on the grand jury.

[4] The court's original pre-trial ruling on this issue was insufficiently specific. See Pre-trial Transcript, October 12 hearing, p. 211; *Cofield v. State*, 247 Ga. 98(4), 274 S.E.2d 530 (1981). However, the court subsequently clarified its ruling. See Trial Transcript p. 350; *Parks v. State*, 254 Ga. 403(1), 330 S.E.2d 686 (1985).

or promises by the officers, or of a request for an attorney by Ford, the court did not err by finding the confession to have been voluntary.

7. We adhere to our position that the practice of death-qualification of jurors is not unconstitutional, *Mincey v. State*, 251 Ga. 255(2), 304 S.E.2d 882 (1983), despite the Eighth Circuit Court of Appeals' holding to the contrary. See *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir.1985). We agree with the Missouri Supreme Court that *Grigsby* is contrary not only to the overwhelming weight of state and federal authority but also to *Wainwright v. Witt*, 469 U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). *State v. Nave*, 694 S.W.2d 729 (Mo. 1985). Therefore, we find enumeration 9 to be without merit.

8. After trial, Ford's family retained a private attorney to represent him in the post-conviction proceedings, including the motion for new trial and the appeal. The court-appointed trial attorney was dismissed. Ford contends in his 4th enumeration of error that his trial attorney rendered ineffective assistance of counsel, particularly at the sentencing phase of the trial.

"The bench mark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffectiveness claim, convicted defendant must show (1) "that counsel's performance was deficient," i.e., that counsel's performance was not reasonable under all

the circumstances, and (2) that this "deficient performance prejudiced the defense," i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at ___, 104 S.Ct. at 2064. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid.

The complaining defendant must make both showings. His failure "to establish either the performance or the prejudice component results in denial of his Sixth Amendment claim." *King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir.1984). A reviewing court need not "address both components if the defendant makes an insufficient showing on one," *Washington v. Strickland*, supra at ___, 104 S.Ct. at 2069, nor must the components be addressed in any particular order. Ibid.

With the foregoing in mind, we shall now undertake to address the various acts and omissions allegedly demonstrating ineffective representation. For reasons discussed below, we consider this enumeration of error together with enumeration 1, in which Ford complains of the prosecutor's argument at the sentencing phase of the trial.

(a) Ford claims that his trial attorney. Arthur Edge IV, should have offered the "vast wealth of data now available" on the subject of the constitutionality of Georgia's death penalty law, and claims that "[c]ompetent counsel would have known that this very issue is currently awaiting *en banc* decision by the United States Court of Appeals for the Eleventh Circuit in *McCleskey v. Zant* . . . "

In view of the decision since rendered by the *en banc* Eleventh Circuit on this issue. Ford clearly was not prejudiced by any omission here. See *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir.1985) (affirming the denial of habeas relief on the ground of racial bias in the administration of the death penalty, and reversing the grant of habeas relief on another ground).

(b) Nor do we find any possible prejudice from counsel's failure to support with evidence his challenge to the practice of death-qualifying the jury. See Division 7, supra.

(c) Ford claims that attorney Edge made an insufficient effort to change venue. He asserts: "Competent counsel would have engaged an expert, or experts, to analyze the pretrial publicity; and to conduct a survey of the community and/or the prospective jurors to determine community sentiment. Counsel could have called numerous witnesses – being a resident of the area – to attest to the way knowledge and gossip circulate in a community of less than 40,000 people."

That counsel could have taken action that he did not does not necessarily render his performance deficient. Ford does not show how an expert analysis of pre-trial publicity could have accomplished any more than the introduction in evidence of whatever publicity existed. Nor has he explained why competent counsel could not reasonably assume that the voir dire of prospective jurors would establish community sentiment at least as well as a "survey of the community and/or the prospective jurors." (In particular, it would seem that the voir dire *is* a survey of the prospective jurors.)

We find no deficiency here, and in addition, Ford has not established any reasonable probability that, had the suggested additional action been taken, a change of venue would have been granted.

(d) At the guilt-innocence phase of the trial, the court charged (inter alia):

"Malice *may be implied* where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." (Emphasis supplied.)

"[Intent] may be inferred from the proven circumstances or by acts and conduct or it *may be presumed* when it is the natural and necessary consequence of the act." (Emphasis supplied.)

Attorney Edge neither objected to these instructions, nor reserved any objections to them. See *Rivers v. State*, 250 Ga. 303, 309, 298 S.E.2d 1 (1982). Ford now claims that competent counsel would have detected the "clear *Sandstrom* problems" with these instructions, and would have objected. See *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

We find nothing objectionable in the implied malice instruction. Compare OCGA § 16-5-1(b); *Lamb v. Jernigan*, 683 F.2d 1332, 1340 (11th Cir.1982).

As to the intent instruction, we have previously stated our preference for charges stated in terms of "inferences" rather than presumptions (except as to the defendant's sanity and, of course, his innocence). See, e.g., *Rose v. State*, 249 Ga. 628, 631, 292 S.E.2d 678 (1982).

"[T]he term 'inference' has tended to be used more frequently [than the term 'presumption'] for evidentiary devices that are permissive in nature . . . " *Lamb v. Jernigan*, supra at 1335-36 (fn. 4). Nevertheless, a "presumption" is not necessarily mandatory, and a permissive presumption is not unconstitutional so long as it is rational. *Ulster County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224-25, 60 L.Ed.2d 777 (1979).

The intent instruction here "was not reasonably susceptible of an interpretation that relieved the prosecution of its burden of proving intent beyond a reasonable doubt or otherwise undermined the factfinding responsibility of the jury." *Lamb v. Jernigan*, supra at 1340 (addressing an intent instruction identical to the one given in this case).

From the foregoing, it can readily be seen that attorney Edge, was not remiss in failing to object to the above charges and that the defense was not prejudiced by the failure to object.

(e) There likewise being no error in the court's charge on conspiracy. *Anderson v. State*, 153 Ga.App. 401(3), 265 S.E.2d 299 (1980), Edge's failure to object to the charge does not show ineffectiveness of counsel.

(f) We fail to see how Edge can be condemned for failing to request a charge on prior inconsistent statements as substantive evidence. Absent instructions to the contrary, the jury surely regarded substantively *all* the evidence presented to it. See *Gibbons v. State*, 248 Ga. 858, 286 S.E.2d 717 (1982).

(g) Ford claims that attorney Edge should have obtained an independent psychiatric evaluation of the

defendant, and should have filed a special plea challenging his competency.

Ford was evaluated prior to trial, by Dr. Donald P. Grigsby, Ph.D., chief of forensic services at the West Georgia Central Regional Hospital. Dr. Grigby's report, included in the record, attached to the report of the trial judge (see OCGA § 17-10-35(a)), reads, in part, as follows:

"James Ford has never been a prior patient at this hospital or at Central State Hospital; he did spend one year at the Milledgeville Youth Detention Center between the age of 15 and 16. James Ford has no record of prior psychiatric treatment in the State of Georgia.

"James Ford's current mental results are as follows: he is an 18 years old black male that looks his stated age . . . Numerous scars are located on his right forearm; otherwise, no remarkable body/facial characteristics/asymmetries were noted. His eye contact was fair. No tremors or shakes or other psychomotor problems were noted. Vision and hearing appeared normal. His speech was forceful and short and to the point; he was relevant and coherent. Posture and gait were normal. His behavior during testing was attentive, he was cooperative but guarded and acted like a tough man. No impairment of memory function was seen. He was in touch with reality and his thoughts progressed from stimulus to logical conclusion. No abnormal psychiatric content of thought was noted. His affect was appropriate and flat; his mood was somewhat defiant and macho. He was oriented to time, person and place. His intellect appeared dull and his judgment slightly impaired as measured with the Mental Status Exam.

"Neurological screening was negative at this time. Emotional indicators on the Bender would suggest some anxiety.

"Intellectual assessment with the WAIS-R produced a Full Scale IQ of 73, placing him within the borderline range of intelligence. This is believed to be a valid assessment of his current level of functioning.

"Objective personality assessment was attempted but not successfully completed with the short form MMPI. The test was administered to James Ford; however, the results were invalidated by his 'faking sick.' This examiner did not detect the presence of any psychiatric disorder.

"It is the professional opinion of this examiner that James Ford is both legally competent to stand trial and criminally responsible for his behaviors. He is aware of the charges against him, he understands the nature of the judicial process, and he is able to consult with his attorney in building his defense. In regards to his criminal responsibility, it is the professional opinion of this examiner that he did and does know right from wrong and at the time of the alleged crime there was no evidence whatsoever, for a delusional compulsion."

We do not have, on this record, any testimony from Edge as to why he did not move for an independent evaluation, or file a special plea of incompetence. Thus, we can only speculate as to the extent to which Edge might have relied upon, for example, his own observations of the defendant, or other matters, in addition to the above report. In any event, a special plea of incompetence requires "a determination of whether the defendant at the

time of the trial is capable of understanding the nature and object of the proceedings against him and is capable of assisting his attorney with his defense." *Brown v. State*, 250 Ga. 66, 70, 295 S.E.2d 727 (1982). There being no indication in the record that Ford did not understand the nature and object of the proceedings or was incapable of assisting his attorney, Ford has failed to meet his burden of establishing deficiency or prejudice in the failure of trial counsel to file a special plea or to move for additional expert assistance on this issue. Compare *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (1985).

(h) In a related vein. Ford contends that "crucial" mitigating evidence was "either not presented or was presented in a superficial manner which could not have informed the sentencing jury of its importance or weight."

Dr. James Thomas, a pediatrician, testified on behalf of the defense at the hearing on the motion for new trial. On November 8, 1973, when Ford was eight years old, Dr. Thomas diagnosed him as being hyperactive. He prescribed Ritalin, described in the Physician's Desk Reference (PDR) (1985) Edition) as a "mild central nervous system stimulant." Id. at 865. Ford took Ritalin (during the school year) for several years; Dr. Thomas last prescribed the drug on January 17, 1977 (but it was possibly refilled for a limited time afterwards).

Ford's mother testified at the sentencing phase of the trial that "he was a hyperactive kid." However, no evidence was presented at trial that Ford had taken Ritalin for this condition.

Ford calls our attention to the following warning in the PDR (p. 865):

"Drug Dependence.

"Ritalin should be given cautiously to emotionally unstable patients, such as those with a history of drug dependence or alcoholism, because such patients may increase dosage on their own initiative.

"Chronically abusive use can lead to marked tolerance and psychic dependence with varying degrees of abnormal behavior. Frank psychotic episodes can occur, especially with parenteral abuse.[5] Careful supervision is required during drug withdrawal, since severe depression as well as the effects of chronic overactivity can be unmasked. Long-term follow-up may be required because of the patient's basic personality disturbances."

Ford argues: "Clearly, evidence that Appellant, due to his prolonged use of Ritalin, was subject to psychotic episodes was evidence which would have carried a great deal of weight with his sentence. The state's case on punishment would have been effectively rebutted by a showing of another explanation for Appellant's behavior besides that he was evil and malicious."

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[5] Ford misquotes this term as "parental" abuse, instead of "parenteral" abuse. The adjective parenteral means: "1. outside the intestine 2. brought into the body through some way other than the digestive tract, as by subcutaneous or intravenous injection." Webster's New World Dictionary of the American Language, 2nd College Edition 1970. Ritalin, offered only in tablet form, is properly taken orally.

This argument is based upon a misreading of the PDR. The quoted warning does not address itself to normal usage of Ritalin, even if "prolonged." It addresses, instead, "[c]hronically abusive use."

Not only has Ford not shown that he actually suffered psychotic episodes, he has presented no evidence of chronically abusive use which would have the potential to cause such episodes. Thus, Ford has failed to establsh that he was subject to psychotic episodes due to his use of Ritalin, and, therefore, has failed to establish that Edge's performance in this respect was deficient.

(i) Finally, Ford complains of Edge's failure to object to allegedly improper argument by the state, at both phases of the trial. In addition, he contends in his first enumeration of error that the prosecutor's improper closing argument at the sentencing phase of the trial rendered the imposition of sentence fundamentally unfair, citing *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983).

We begin our analysis of these complaints by observing that the portion of *Hance v. Zant* addressing prosecutorial argument has been overruled. See *Brooks v. Kemp*, 762 F.2d 1383, 1399 and 1404-1405 (11th Cir.1985); *Tucker v. Kemp*, 762 F.2d 1480, 1486 (11th Cir.1985). Compare *Conner v. State*, 251 Ga. 113(5), 303 S.E.2d 266 (1983) (expressing our disagreement with *Hance*). We find the correct approach to be as follows.

First, permissible arguments, no matter how effective, do not contravene fundamental fairness; likewise, a failure to object to permissible arguments cannot establish deficient attorney performance.

Second, where the prosecutor argues improperly and no objection is interposed, whether reversal is required depends upon an evaluation of prejudice that is undertaken in an essentially identical manner whether the improper arguments are considered directly or in the context of an ineffectiveness claim. Compare *Strickland v. Washington*, supra (prejudice is established by a showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"), with *Brooks v. Kemp*, supra (applying *Strickland* "reasonable probability" test in context of improper prosecutorial argument), and *Conner v. State*, supra (where argument not objected to, we determine only whether impropriety was so egregious that death sentence was imposed as a result of passion, prejudice or other arbitrary factor).

Thus, our evaluation of Ford's direct attack upon the prosecutor's sentence-phase argument, as well as his indirect attack upon the prosecutor's argument in general, via his ineffectiveness claim, may be undertaken by determining, first, which (if any) portions of the state's argument were improper, and, second (if improprieties are discovered), whether the improper arguments were so egregious as to require a new trial.

(i-1) The guilt-innocence phase.

Ford complains that during the prosecutor's opening statement the evidence was described as "horrible and gruesome." Since this was an accurate description, we find nothing objectionable about it, despite Ford's contention that it was argumentative and inflammatory.

Nor do we find anything objectionable in the prosecutor's comment that he wished he could show a "video tape of what happened," but since he could not, he would "try to explain it" in such a way that "if you will try to imagine in your minds as if you're watching television . . . you'll see how the case is going to be presented to you and why it's presented in a certain way."

In the prosecutor's closing argument, however, we do find improprieties, including expressions of personal opinion and a misstatement of the law.

Regarding the expressions of personal opinion, we note that Directory Rule 7-106(c) of our State Bar Canons of Ethics states in part: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (3) assert his personal knowledge of the facts in issue, except when testifying as a witness; (4) assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." 252 Ga. at 629.

"Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued." Commentary to ABA Standards for Criminal Justice 3-5.8(b) (2d Ed. 1980), p. 3-89.

The prejudice emanating from such argument depends upon the context in which it is given. Although expressions of personal opinion are objectionable in any

event, and should be avoided, nonetheless, when the evidentiary facts supporting such a conclusion are cited and the conclusion follows naturally from such facts, the mere use of the phrase "I think . . . " as opposed to "I contend . . . ," or "I submit . . . ," or "The evidence shows . . . ," is unlikely to have a strong impact on the jury's independent evaluation of the evidence. Cf. *Conklin v. State*, 254 Ga. 558, 571, 331 S.E.2d 532 (1985); *Brooks v. Kemp*, supra, 762 F.2d at 1413-1414.

Here, the prosecutor stated that he did not "think" there was "any question" but that the butcher knife Ford wielded was a deadly weapon, that he "really" did not "think" the money Ford got was worth Sarah Dean's life, and that although the jury would have a hard job deciding the case, he "imagine[d]" Sarah Dean would "swap places with [the jury] real quick." In addition, he argued: "Here we have, according to all the testimony, and I didn't know Mrs. Dean, but I think if I did I'm sure she was a fine person. I did not know her but you heard the testimony from the people that did." Finally, he stated his dislike of Steven Cox.

Each of these arguments was objectionable (and also "easily avoided").[6] However, we find no reasonable probability that their exclusion would have changed the result at the guilt-innocence phase of the trial, even when considered in conjunction with the misstatement of the law dealt with below.

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[6] "This kind of argument is easily avoided by insisting that lawyers restrict themselves to statements such as 'the evidence shows . . . ' or something similar." ABA Standards for Criminal Justice, supra at 3-89.

The misstatement occurred when the prosecutor argued as follows: "[T]he judge will charge you, that in malice, malice aforethought, number one, that a person intends the act that he committed. If they do something – if I come and grab the podium and I push it over, I intended to do that, unless it's proven otherwise. If you see me do that you're pretty sure that's what I intended, even though you can't read my mind. So a person commits an act and by that act a person is killed; the completion of that act causes death, that's a sufficient intent . . . [T]hat is the intent that the law speaks of as to what did a person think. Did I do that action that I just discussed with you. Don't let that be confusing to you all."

This explanation was incorrect. *Francis v. Franklin*, ___ U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana*, supra. However, the trial court's instructions on intent and malice were correct, and, considered in light of the strength of the evidence, were sufficient to cure the improper impact of the argument.

(i-2) The sentencing phase.

We do not agree with Ford's contention that the prosecutor "unfairly summarized the controversy over the . . . death penalty by focusing exclusively on retribution." Although there are other legitimate sentencing concerns, see *Conner v. State*, supra, a prosecutor is under no obligation to argue all of them.

The prosecutor did not err by noting the obvious fact that the victim was gone and would never be here again. See *Brooks v. Kemp*, supra at 1409-10. Nor did the prosecutor err by arguing: "[O]ur government has determined

that the death penalty is appropriate and necessary in certain cases and should be provided . . . It's up to you to decide if this is that type of case that deserves the death penalty." This was a correct statement of the law. His further argument that law and order depended upon the confidence of the citizenry that criminals would receive the punishment they deserved was not improper. See *Conner v. State*, supra at 120, 303 S.E.2d 266 (quoting former U.S. Supreme Court Justice Stewart's plurality and concurring opinions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), respectively).

Finally, the prosecutor committed no impropriety by arguing that the jury was commanded "to do what is right and what is just"; by following his discussion of the heinousness of the crime with the dramatic assertion that Sarah Dean would be "in there" with the jury, asking for justice; or by concluding: "By God we draw the line somewhere and this is it folks. Enough is enough and we draw the line. You say it for Sarah Dean, say it for all of us, enough is enough. It's got to stop. Thank you."

We do not, however, find that the prosecutor's argument was devoid of impropriety.

Our major concern is not the brief expression of a personal opinion early in his argument. The effect of this impropriety clearly was inconsequential.

The more serious impropriety occurred when the prosecutor argued as follows:

"If someone wants to forgive Ford, let Sarah Dean forgive him. She is the only one who has the right to do that. She and the Lord. Don't take that right away from her. Say, well that's all right Sarah, I'm going to forgive him for what he did to you. Don't take that away. That would be the worst tragedy we could have in this court for you to do that . . .

"God is the only one who can forgive. He and Sarah Dean. Christ said you can turn the other cheek when you are hit but you can't turn the cheek for someone else. The law of God prescribes the law of man and to impose order on society we must have both . . .

"Come back with whatever you like. It's your choice. But in fact, as I said before, not only would it be a travesty but a very sick joke against Sarah Dean . . . "

It is undoubtedly true that a jury has no right to forgive a defendant. See *Felker v. State*, 252 Ga. 351, 378, 314 S.E.2d 621 (1984). The fact of conviction, however, suffices to ensure that the jury will not forgive the defendant. At the sentencing phase of the trial the question is not *whether* the defendant will be punished, it is, rather, *how much* he will be punished. Once a statutory aggravating circumstance is established, the issue is not forgiveness, it is mercy. By confusing these two terms, the prosecutor in effect argued that the jury had no right to be merciful. Such an argument is legally incorrect.

"Just as retribution is an appropriate justification for imposing a capital sentence . . . [so is] mercy . . . an acceptable sentencing rationale." *Drake v. Kemp*, 762 F.2d 1449, 1460 (11th Cir.1985).

A prosecutor is entitled to "urge vigorously that a death sentence is appropriate punishment in the case at hand . . . " *Walker v. State*, 254 Ga. 149, 159, 327 S.E.2d 475 (1985). It follows that he is entitled also to "urge vigorously" that mercy is inappropriate "in the case at hand." To argue, however, that the jury has no *right* to be merciful goes too far, as does the characterization of the exercise of mercy as a "travesty and a sick joke." *Drake v. Kemp*, supra. Cf. ABA Standards for Criminal Justice 3-5.10 ("The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.")

Having identified improprieties in the prosecutor's sentencing argument, we must now determine "whether there was a reasonable probability that the improper arguments changed the jury's exercise of discretion in choosing between life imprisonment or death." *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir.1985).

Examining all the circumstances, we do not find a reasonable probability that, but for the improper argument, Ford would have received a life sentence.

First, as we noted above, the prosecutor had a right to argue that mercy was inappropriate in the case at hand, and much of the prosecutor's argument was devoted to a discussion of facts which supported his contention that the death penalty was called for in this case.

Second, the prosecutor did concede, albeit grudgingly, that the jury had the right to recommend a life sentence, and the defense attorney, for his part,

pointed out that he was not asking the jury for forgiveness, excuse, or pardon – he was asking only for something less than a death sentence, and he called the jury's attention to the likelihood that if the jury opted for mercy, Ford could get "four life sentences and twenty years on top of that."

Third, the trial court's instructions informed the jury that it was the latter's responsibility "to determine within the limits prescribed by law the penalty that shall be imposed," explaining that every person found guilty of murder would be "punished by death or by imprisonment for life." The court instructed the jury to consider mitigating circumstances, which the court defined as "those which do not constitute a justification or excuse for the offense of murder, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability so as to justify a sentence of life imprisonment rather than death," and further explained that the jury could provide for a life sentence whether or not it found any mitigating circumstances, "for any reason satisfactory to [the jury], or for no reason."

These countervailing arguments and instructions mitigated to a large degree, if not completely, the impropriety of the prosecutor's argument.

We note that in this case "[t]here was overwhelming evidence of guilt, thus reducing to a minimum the chance that an innocent person will be executed." *Tucker v. Kemp*, 762 F.2d 1496, 1509 (11th Cir. 1985).[7]

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[7] We note in addition that Ford testified at the sentencing phase – admitting the crimes, but asking for mercy.

Moreover, the jury found that the murder was "outrageously or wantonly vile, horrible or inhuman," and that it was committed during the commission of the additional capital felonies of armed robbery, kidnapping with bodily injury, and rape. See OCGA § 17-10-30(b)(2) and (b)(7). The victim gave Ford no reason to attack her; the crimes were entirely unprovoked, and the murder was preceded by serious physical and psychological abuse. The crime was indeed (as the prosecutor contended) "horrible."

In mitigation, it was shown that Ford had grown up without a father present, had experienced difficulty with his schoolwork, but had never before been in serious trouble. While not frivolous, these mitigating circumstances are hardly "commanding" in the face of the egregiousness of the crime. *Brooks v. Kemp*, supra at 1416. Compare *High v. Zant*, 250 Ga. 693, 694-95, 300 S.E.2d 654 (1983).

"Considered in light of all facts and circumstances of the case, the improper arguments, most of which were mitigated by other arguments and instructions by the court, were not sufficient to undermine confidence in the outcome." *Brooks v. Kemp*, supra at 1416.

(j) For the foregoing reasons, we find that neither attorney Edge's performance nor the prosecutor's improper argument justifies reversal of Ford's convictions or death sentence.

SENTENCE REVIEW

9. The jury found that the offense of murder was committed while the defendant was engaged in the

commission of the additional capital felonies of rape, kidnapping with bodily injury, and armed robbery. See OCGA § 17-10-30(b)(2). Ford was convicted of these capital felonies at the guilt-innocence phase of the trial. Just as the evidence supports Ford's conviction for these offenses, the evidence supports the jury's findings in regard to the § b(2) aggravating circumstance.

The jury also found that "the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind." See OCGA § 17-10-30(b)(7). In this case, the victim clearly suffered serious and intentionally-inflicted physical and psychological abuse. She was kidnapped, raped, stuffed into the trunk of her own car, driven around for several hours, hit on the head with a metal road sign (after pleading for her life), and pushed into a pond (still in the trunk of her car and still conscious), where she drowned. The evidence supports beyond a reasonable doubt the jury's findings of the § b(7) aggravating circumstance. OCGA § 17-10-35(c)(2). Compare *Whittington v. State*, 252 Ga. 168(9 b), 313 S.E.2d 73 (1984); *Phillips v. State*, 250 Ga. 336(6), 297 S.E.2d 217 (1982).

10. From our review of the record, including matters addressed in Division 8 of this opinion, we find that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor. OCGA § 17-10-35(c)(1).

11. Ford's death sentence is not disproportionate to the life sentence received by co-defendant Steve Cox. See *Allen v. State*, 253 Ga. 390(8), 321 S.E.2d 710 (1984). Aside from the difference in ages (Cox was only 15 at the time

of the crime), the evidence tends to show that Ford was the more culpable of the two, i.e., that he and not Cox drove the car, raped the victim, hit her with the road sign, let the car out of gear prior to pushing it into the pond, and got the money.

In addition, Ford's death sentence is neither excessive nor disproportionate to sentences imposed in similar cases generally. OCGA § 17-10-35(c)(3). The similar cases listed in the Appendix support the imposition of the death penalty in this case.

Judgment affirmed.

All the Justices concur.

APPENDIX

Alderman v. State, 254 Ga. 206, 327 S.E.2d 168 (1985); *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984); *Finney v. State*, 253 Ga. 346, 320 S.E.2d 147 (1984); *Brown v. State*, 250 Ga. 66, 295 S.E.2d 727 (1982); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981); *Justus v. State*, 247 Ga. 276, 276 S.E.2d 242 (1981); *Green v. State*, 246 Ga. 598, 272 S.E.2d 475 (1980); *Stevens v. State*, 245 Ga. 583, 266 S.E.2d 194 (1980); *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980); *Hardy v. State*, 245 Ga. 272, 264 S.E.2d 209 (1980); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472 (1979); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Westbrook v. State*, 242 Ga. 151, 249 S.E.2d 524 (1978); *Morgan v. State*, 241 Ga. 485, 246 S.E.2d 198 (1978); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978).

SUPREME COURT OF THE UNITED STATES October Term 1986 No. 85-6253. JAMES A. FORD *v.* GEORGIA. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Griffith v. Kentucky*, *ante*, p. 314. Reported below: 255 Ga. 81, 335 S.E.2d 567.

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257 Ga. 661
FORD
v.
The STATE.
No. 42154.
Supreme Court of Georgia.
Nov. 30, 1987.
Reconsideration Denied Dec. 16, 1987.

SMITH, Justice.

Ford v. State, 255 Ga. 81, 335 S.E.2d 567 (1985), was pending before the Supreme Court of the United States when *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), was decided on January 13, 1987. *Griffith* established the principle that the ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), applied retroactively to all cases, state or federal, pending on direct review when *Batson* was decided. Thus, in keeping with *Griffith*, supra, the Supreme Court of the United States vacated its grant of Ford's petition for writ of certiorari, U.S. Supreme Court Case No. 85-6253, and on March 25, 1987, remanded the case to the Supreme Court of Georgia for further consideration in light of *Griffith v. Kentucky*, supra, ___ U.S. ___, 107 S.Ct. 1268, 94 L.Ed.2d 129 (1987).

1. *Batson* stands for the principle that a prosecutor may not strike a black juror solely because of his race, nor upon any assumption based solely upon the juror's race. 106 S.Ct. at 1723. See *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987).

2. In *Batson*, the defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen, through the use of peremptory challenges, violated his 6th and 14th Amendment rights. The *Batson* Court observed that, "[the] petitioner made a timely objection to the prosecutor's removal of all black persons on the venire." Id. 106 S.Ct. at p. 1725. The Court also observed: "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Id. at p. 1724, fn. 24. It went on to state that it expressed no view as to how a court should handle the matter, upon a finding of discrimination against black jurors, but made it clear that it must be handled in such a manner as to erase the discrimination in the jury selection.

3. *Batson* may be understood to require that any objection as to peremptory strikes be made *before* the trial of the case begins. This is further supported by *Griffith*, supra, 107 S.Ct. at p. 710, where the facts show that the motion to discharge the panel based upon a discriminatory selection of jurors was made immediately after the selection process was completed and before trial had begun. It is consistent with our holding in *State v. Sparks*, 257 Ga. 97, 98, 355 S.E.2d 658 (1987), where we held that "any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn."

4. In this case, Ford filed a "Motion To Restrict Racial Use of Peremptory Challenges."[1] This motion was

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[1] The motion was as follows: "Now comes JAMES FORD, the Defendant in the above styled action, and moves the Court

(Continued on following page)

based on the law as it existed at that time under *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965)

(Continued from previous page) —

to restrict the Prosecution from using it's peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the Jury. In support of this Motion, the Defendant shows:

1.

"The Prosecutor has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race.

2.

"This case involves a black accused and the victim is a member of the white race.

3.

"It is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes.

4.

"The exclusion of members of the black race in the Jury when a black accused is being tried is done in order that the accused will receive excessive punishment if found guilty, or to inject racial prejudice into the fact finding process of the Jury. See *McCray vs. New York*, [461] U.S. 961 [103 S.Ct. 2438, 77 L.Ed.2d 1322], 33 Cr.L. 4067 (82-1381, May 31, 1983). *Taylor vs. Louisiana*, 419 U.S. 522 [95 S.Ct. 692, 42 L.Ed.2d 690] (1975).

"WHEREFORE, the Defendant prays that this Court enter an Order granting the relief requested herein."

– that is, that the defendant must show a pattern of systematic exclusion of blacks as jurors in criminal trials within the circuit. Ford offered no proof of his contentions.

(a) The trial court denied the motion on October 10th, ten days before the trial began. In commenting upon this denial on the second day of the trial, the judge stated that he had seen "numerous or several cases" in which there were black defendants and the district attorney's office struck white prospective jurors and left prospective black jurors on the jury. "I have seen that happen here and in other counties in the circuit."

(b) After the jury had been selected and sworn in, the trial court afforded the defense an opportunity to make any necessary motions. None were made.

(c) In the direct appeal from Ford's conviction, this court found that he had failed to demonstrate a pattern of systematic exclusion of blacks from criminal juries in the circuit. *Ford v. State*, 255 Ga. 81, 83(1), 33[illegible] S.Ed.2d 567.

5. Under *Griffith*, it is now unquestioned that Ford may insist upon the *Batson* issue, notwithstanding that his conviction preceded the date of that opinion.

But nothing in *Griffith* would warrant the extension of relief *upon grounds never raised at trial*. Indeed, all that *Griffith* dictates is that objections made – at trial – must be resolved under the *Batson* rule, whether or not they antedated the enunciation of that rule.[2]

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[2] "We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases,

(Continued on following page)

6. We have delineated a time period within which a *Batson* motion is timely.

(a) In *State v. Sparks*, 257 Ga. 97, 355 S.E.2d 658, we allowed as timely a *Batson* motion that was made shortly after the jurors had been sworn. We held that "hereafter any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." In *Riley v. State*, 257 Ga. 91, 94(3), 355 S.E.2d 66, we held as untimely a *Batson* motion that was made after the jury had been sworn and five witnesses had testified.

(b) Ford made no contemporaneous objection to the composition of the jury as selected. His pre-trial motion was not an objection to the jury as selected, but to an alleged pattern of systematic exclusion of black jurors. There was no objection made after the jury was sworn.

(c) Further, even if colloquy in the trial judge's chambers on the second day of trial might be interpreted as a *Batson* motion, it would not have been timely under *Riley v. State*, supra.

7. The determinative issue thus becomes whether our contemporaneous objection rule is a valid state procedural bar to Ford's *Batson* complaint.

In *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977), the United States Supreme Court held:

(Continued from previous page)

state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 107 S.Ct. at 709.

"A defendant has been accused of a serious crime, and [the trial] is the time and place for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the results that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification."

8. We now conclude this matter as follows:

(a) Ford's motion under *Swain*, having been decided adversely to him on appeal, cannot be reviewed in this proceeding. *Ford v. State*, supra.

(b) While the circumstances of the jury selection may raise implications under *Batson*, and are not precluded from review under the authority of *Griffith*, Ford made no objection to the composition of the jury after it was selected and before the trial commenced.

(c) The rules of our state require that a defendant who questions the composition of his trial jury must make objection "prior to the time the jurors selected to try the case are sworn." *Sparks*, supra.

(d) The failure of Ford timely to object is a valid state procedural bar to any complaint he may have under *Batson*. *Wainwright v. Sykes*, supra.

9. Upon remand from the United States Supreme Court, we adhere to our initial judgment of affirmance.

Judgment affirmed upon remand.

All the Justices concur except GREGORY and HUNT, JJ. who dissent.

GREGORY, Justice, dissenting.

Prior to trial, Ford filed a motion asking the trial court "to restrict the Prosecution from using its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the jury." This motion was denied by the trial court. Subsequently, the prosecutor exercised nine of his ten peremptory challenges against blacks.

On direct appeal, this court, like the trial court, ruled on the issue without having the benefit of the pronouncement of the United States Supreme Court in the since-decided case of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). See *Ford v. State*, 255 Ga. 81(1), 335 S.Ed.2d 567 (1985). Now, having held that *Batson* applies retroactively to cases, such as this one, that were tried prior to *Batson* but were still pending on direct appeal when *Batson* was decided, *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the United State Supreme Court has remanded the case to us for reconsideration under *Batson*.

Today, the majority of this court holds that because Ford raised the discrimination issue before the jury selection began, it was not timely, or was not really a *Batson*-type objection at all.

While I agree that "nothing in *Griffith* would warrant the extension of relief *upon grounds never raised at trial* . . . " (majority at p. 765), I cannot agree that Ford never raised a *Batson*-type claim, nor do I think that we may avoid addressing the merits of a *Batson* issue that was raised at trial on the ground that it was raised too soon under a procedural rule of timeliness that we created *after* the case was tried.

I do not doubt that we may establish procedural rules regarding the correct time to raise *Batson* claims. But other than the general rule that issues cannot be raised for the first time after trial, no procedural rules governing the raising of *Batson* claims were in existence when Ford's case was tried, for the very simple reason that *Batson* had not yet been decided.

We say now that the *Batson* claim should have been raised after the jury was selected. There is nothing wrong with this rule. However, Ford had no way of knowing but what if he had waited until after the jury was selected to raise the issue, we would have held that he waited too late; that he should have raised the issue prior to trial, so that the prosecutor would be on notice that his exercise of peremptory challenges would be scrutinized for racial discrimination.

Because the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim

did not exist when Ford's case was tried, it cannot possibly be "the sort of firmly established and regularly followed state practice that can prevent implementation of [Ford's] federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). Moreover, such an "unannounced" and "novel application of a procedural bar of which [Ford] 'could not fairly be deemed to have been apprised . . . ' [Cit.]" will not bar "federal habeas review of this claim . . . " *Mann v. Dugger*, 817 F.2d 1471 (11th Cir. 1987).

Prior to trial, Ford moved the trial court to restrict the prosecutor from exercising his peremptory challenges in a racially discriminatory manner. The trial court denied the motion. After the jury was selected, the prosecutor offered to explain his peremptory challenges. The trial court ruled that such a proffer would be unnecessary, notwithstanding that the prosecutor has exercised nine of his ten peremptory challenges against blacks.

Inasmuch as *Batson* had not been decided when this case was tried, the trial court's rulings were understandable. Nonetheless, under *Batson* they were erroneous.

I dissent to the majority opinion. I would remand this case to the trial court to give the prosecutor an opportunity to rebut the prima facie case of discrimination under *Batson*.

I am authorized to state that Justice HUNT joins in this dissent.

SUPREME COURT OF THE UNITED STATES

No. 87-6796

James A. Ford,

Petitioner

v.

Georgia

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Georgia.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Questions 1 and 2 presented by the petition.

April 23, 1990

No. 87-6796 (6)

In The

Supreme Court of the United States

October Term, 1990

JAMES A. FORD,

Petitioner,

v.

GEORGIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Georgia

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QUESTIONS PRESENTED

1. DID THE GEORGIA SUPREME COURT FAIL TO COMPLY WITH THIS COURT'S REMAND ORDER REQUIRING RECONSIDERATION OF PETITIONER'S CASE IN LIGHT OF *GRIFFITH v. KENTUCKY*?

2. CAN THE RULE OF RETROACTIVITY ESTABLISHED IN *GRIFFITH* BE DEFEATED BY A STATE APPELLATE COURT'S *POST HOC* INVOCATION OF A PREVIOUSLY UNANNOUNCED STATE PROCEDURAL RULE AS A BAR?

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The Georgia Supreme Court opinion which formed the basis of Petitioner's first petition for certiorari is reported at 335 S.E.2d 567 (Ga. 1985). (Joint Appendix at 22-48, hereinafter J.A."). This Court's grant of certiorari and remand to the Georgia Supreme Court was announced on February 23, 1987, and is reported at 479 U.S. 1075 (1987). (J.A. 49). The opinion of the Georgia Supreme Court following remand from this Court was issued on November 30, 1987, and is reported at 362 S.E.2d 764 (1987). (J.A. 50-58). The Georgia Supreme Court denied rehearing on February 15, 1988.[1] This Court granted certiorari on April 23, 1990. 110 S. Ct. 1921 (1990) (J.A. 59).

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257(a), as Petitioner asserted below and asserts in this Court a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

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[1] Rehearing was initially denied on December 16, 1987, but that order was vacated because counsel for Petitioner had not been notified of the decision.

The Fourteenth Amendment provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner is a black man convicted in 1984 of the murder of a white store owner and sentenced to death by a petit jury from which nine of the ten black venire members were struck peremptorily by the prosecutor.

Prior to his trial, Petitioner filed a motion "to restrict racial use of peremptory challenges" to "exclude members of the black race from serving on the jury." (J.A. 3-4). In support of his motion, Petitioner alleged that the prosecutor "has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues of the trial involved members of the opposite race." *Id.* at 3. After pointing out that his case involved a black defendant and a white victim, Petitioner stated that "[i]t is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes." *Id.* at 4.

The trial court addressed Petitioner's motion at a pretrial hearing. Petitioner's counsel stated, "it's been my experience, and the Court is aware that the district attorney and the other assistant district attorneys have a history and a pattern when you have a defendant who is black, of using their peremptory challenges to excuse potential jurors who are also black." (J.A. 10). In light of

that experience, counsel specifically requested that the court require the prosecutor to justify on the record the reasons for using any peremptory challenge to excuse potential black jurors. Otherwise, counsel argued, the inference would persist that the prosecutor was using peremptory challenges to excuse jurors "solely because they are black and for no other reason." *Id.* The prosecutor opposed the motion on the ground that *Swain v. Alabama*, 380 U.S. 202 (1965), permitted the use of peremptory challenges to exclude members of the venire for any purpose, including "because they have blue eyes." *Id.* at 11.

The trial judge denied the motion, noting that in his experience he had seen "cases in which there . . . have been black defendants and the district attorney's office has struck prospective white jurors and left prospective black jurors on the jury . . . . I don't know why. Maybe it just happens because the person struck was just sorry or for one reason or another . . . . I'm taking that into consideration among other things and denying the motion to restrict racial use of peremptory challenges." *Id.* at 11-12.

Although no transcript exists of the later portion of the proceedings at which the prosecutor exercised his peremptory challenges and the jury was sworn, there is no dispute that the prosecutor used nine of his ten peremptory challenges to strike black prospective jurors.[2] As a consequence, the jury that convicted and sentenced

[2] *See* J.A. 25 and *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985).

Petitioner to death had eleven white members and one black member.

Shortly after the trial began, during a conference in chambers, the judge referred to an earlier motion made by Petitioner that was directed "to the State's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck." (J.A. 15). The court noted, however, that one black juror was seated, and that another black prospective alternative juror had been struck by the defense. The Court then concluded:

> *That's what happened in the jury selection process.* I think that needs to be put in since that motion was made. Of course, the motion has been denied. It doesn't matter now but I think *just for the record's sake* that ought to be done . . .

(J.A. 15-16; emphasis added).[3] In response to the Court's comments, the prosecutor asked if "it would be appropriate for the State to make any kind of showing as to why

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[3] Since the proceedings on Petitioner's pretrial motion to restrict the prosecutor's use of peremptory challenges in a discriminatory manner was on the record, *see* J.A. 3-4 and 10-12, this statement suggests that the court may have been referring to a motion that was made during the jury selection portion of the trial, when the prosecutor used his peremptory challenges; those proceedings were not on the record. *See* J.A. 12-13. At the hearing on the motion for a new trial, Petitioner's counsel also referred to the colloquy in chambers as concerning petitioner's objection "to the use of peremptory challenges by the district attorney on the basis that he was excusing black people on a basis of racial bias alone. . . . " (JA. 17). Counsel described this objection as having been "re-assert[ed]." *Id.* at 18.

those challenges were used?" (J.A. 16). The court replied that it was not "asking for such a showing to be made." *Id.*

The issue of the state's use of peremptory challenges to strike potential black jurors was raised again in Petitioner's motion for a new trial. At the hearing on that motion, Petitioner's counsel specifically referred to Petitioner's objection "to the use of peremptory challenges by the district attorney on the basis that he was excusing black people on a basis of racial bias alone. . . . " (J.A. 17). The motion was denied.

On appeal to the Georgia Supreme Court, Petitioner assigned error to the trial court's denial of his motions attacking the prosecutor's use of peremptory challenges. Petitioner argued that it was time for the Georgia Supreme Court to "[re]examine its previous position" on *Swain*, which was "no longer a viable basis for sanctioning clearly biased use of peremptories." Brief for Appellant at 7, *Ford v. State*, 335 S.E.2d 567 (Ga. 1985). Petitioner pointed out that he had made a timely objection and noted that the "prosecutor had used nine of his ten (90%) peremptories to strike black prospective jurors in a case where there was a white victim and a black defendant." *Id.* at 9.

The Georgia Supreme Court affirmed Petitioner's conviction. The court characterized Petitioner's *Swain* challenge as being directed at "the prosecutor's use of peremptory strikes to remove 9 of 10 possible black jurors . . . . " *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985). The court concluded that Petitioner had failed to show a violation of any constitutional right because his evidence went only to the racially discriminatory use of peremptory challenges in the selection of *his* jury, and not the

district-wide pattern of discrimination then required by *Swain* and its progeny:

> Ford has shown only that a large percentage – but not all – of black prospective jurors were peremptorily struck by the prosecution in *this* case. 'He has failed to establish a systematic exclusion of black jurors, leading to a general condition that black citizens do not serve on criminal trial juries in the circuit.' *Moore v. State*, 254 Ga. 525, 529(2(b)), 330 S.E.2d 717 (1985). Accordingly we find no error here.

Id. (Emphasis in original).

Petitioner filed a petition for a writ of certiorari in this Court on January 22, 1986. The Court decided *Batson v. Kentucky*, 476 U.S. 79, on April 30, 1986, recognizing a criminal defendant's right to challenge a denial of equal protection by showing that the prosecutor had excluded black persons from serving on the petit jury in the defendant's own case on the basis of their race. On January 13, 1987, the Court decided *Griffith v. Kentucky*, 479 U.S. 314, holding that the new evidentiary standard announced in *Batson* would apply to all criminal cases then pending in which a judgment of conviction had not become final: "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . . " *Id.* at 328. The Court then granted certiorari in Petitioner's case, vacated the judgment of the Georgia Supreme Court, and remanded the case for further consideration in light of *Griffith*.[4]

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[4] The Court's order in *Ford v. Georgia*, 479 U.S. 1075 (1987), recited that the judgment of the Georgia Supreme Court was

(Continued on following page)

On November 30, 1987, the Georgia Supreme Court *sua sponte* held that Petitioner's challenge to the prosecutor's discriminatory use of peremptories was procedurally barred. *Ford v. State*, 362 S.E.2d 764 (Ga. 1987), *cert. granted*, 110 S. Ct. 1921 (1990). The court neither requested briefing nor heard argument. In finding a procedural default, the court relied on its May 19, 1987, decision in *State v. Sparks*, 355 S.E.2d 658 (Ga.), a decision it rendered 30 months after Petitioner's trial concluded, and 19 months after the Georgia Supreme Court had first affirmed Petitioner's conviction.[5] The court concluded that because, in its view, Petitioner had not complied with the requirement first announced in *Sparks* by making an objection to the alleged discriminatory use of peremptory challenges after the jury was selected but before it was sworn, Petitioner was barred from pursuing any claim he may have had under the standards announced in *Batson*. Two justices dissented, noting:

> Because the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim did not exist when Ford's case was tried, it cannot possibly be "the sort of firmly established and regularly followed state practice that can prevent implementation of [Ford's] federal constitutional rights." *James v.*

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"vacated and [the] case remanded for further consideration in light of *Griffith v. Kentucky* . . . . "

[5] Significantly, *Sparks* found that no state procedure for raising *Batson* claims had previously been established, but that "*hereafter* any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." 355 S.E.2d at 659 (emphasis added).

Kentucky, 466 U.S. 341, 104 S. Ct. 1830, 80 L.E.2d 346 (1984).

362 S.E.2d at 767 (Gregory, J., dissenting). The Georgia Supreme Court denied reconsideration on February 15, 1988.

This Court granted certiorari on April 23, 1990, "limited to Questions 1 and 2 presented by petition." 110 S. Ct. 1921 (1990) (J.A. 59).

SUMMARY OF ARGUMENT

The Georgia Supreme Court, in holding that Petitioner was procedurally barred from pursuing his repeatedly asserted constitutional objection to the prosecutor's racially discriminatory use of peremptory challenges, ignored the remand mandate of this Court and the requirement of *Griffith* that *Batson* be applied retroactively. The procedural rule upon which that court relied is not an independent and adequate state ground for avoiding a decision on the merits of Petitioner's claim.

Notwithstanding the mandate of *Griffith*, the Georgia Supreme Court here declined to apply *Batson* to Petitioner's case. Instead, invoking a contemporaneous objection rule, and acting without the benefit of briefing or oral argument, it denied Petitioner even a hearing into the basis for the prosecutor's peremptory exclusion of nine of the ten black prospective jurors in his case. The Georgia court held that Petitioner's objection to the prosecutor's racially discriminatory use of peremptory challenges – an objection first made by Petitioner before trial and repeated during the trial and at every stage of his

appeals – did not comply with the expressly prospective procedural requirements adopted in *State v. Sparks*, 355 S.E.2d 658 (Ga. 1987), a decision that came 30 months after Petitioner's trial.

Petitioner objected to the prosecutor's racially discriminatory use of peremptory challenges, and did so in a manner that satisfied the evidentiary and procedural requirements that governed such objections at the time of his trial. Neither the trial court, nor the Georgia Supreme Court in denying Petitioner's first appeal, found any procedural fault with the manner in which Petitioner raised his constitutional claim. To the contrary, the Georgia Supreme Court denied that portion of his appeal on the stated ground that the evidence presented by Petitioner concerned discrimination only "in *this* case" and not the district-wide pattern required by *Swain*. *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985) (emphasis in original). In short, Petitioner fully complied with then prevailing Georgia law in challenging the prosecutor's use of race in selecting his jury, and attempted to prove those allegations relying upon just the kind of evidence later found to be appropriate in *Batson*.

The Georgia Supreme Court's conclusion that Petitioner failed to preserve a *Batson* objection, notwithstanding the clear statement of his claim in the trial court, is based upon the critically flawed premise that *Batson* and *Swain* involve different constitutional claims. In fact, however, *Batson* and *Swain* define the same constitutional claim, under different evidentiary standards, and the Georgia court's holding to the contrary completely eviscerates the mandate of this Court.

Properly viewed, this Court's holding in *Griffith* requires the application of *Batson* in cases pending on direct appeal in which the defendant has raised an objection to racially discriminatory use of peremptory challenges, regardless of the evidentiary standard under which that objection was made. The procedural rule announced in *State v. Sparks* is not an independent and adequate state ground for avoiding the mandate of *Griffith* in this case. To the contrary, the application of a procedural rule first announced more than two years after Petitioner's trial violates "basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THE RULE OF *GRIFFITH* THAT *BATSON* BE APPLIED RETROACTIVELY

Although the basis for its disposition is far from clear, the Georgia Supreme Court, in refusing to follow this Court's mandate on remand, apparently acted on the mistaken notion that an equal protection claim under *Swain* was substantively different from one under *Batson*. *Griffith v. Kentucky*, 479 U.S. 314 (1987), however, makes clear that no such distinction exists; indeed, all that the Court decided in *Griffith* was that the evidentiary standard announced in *Batson* would be applied retroactively to *Swain* claims pending at the time *Batson* was decided. Thus under *Griffith* and this Court's remand in this case, a perceived difference in claims under *Swain* and *Batson* does not support the Georgia Supreme Court's refusal to evaluate the constitutionality of Petitioner's conviction under *Batson*.

In *Griffith*, this Court "granted certiorari . . . limited to the question [of] whether the ruling in *Batson* applies to a state conviction pending on direct review at the time of the *Batson* decision," and decided that it did. 479 U.S. at 318. Specifically, this Court held that " . . . a new rule for the conduct of criminal prosecutions is to be applied retroactively *to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.*" *Id.* at 328 (emphasis added). Thus, since Petitioner's *Swain* claim was on direct appeal to this Court when *Batson* was decided, "it is . . . unquestioned" that his case came within *Griffith's* ambit. *Ford v. State*, 362 S.E.2d at 765.

The Georgia Supreme Court's refusal to apply *Batson* retroactively to Petitioner's equal protection challenge to the prosecutor's discriminatory use of peremptory strikes cannot be squared with *Griffith*. As this Court recognized in *Griffith*, a "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. Indeed, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 323. However, since this Court "[a]s a practical matter . . . cannot hear each case pending on direct review," it "fulfill[s its] judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* In this case, the Georgia Supreme Court has refused to accept that role, in

violation of "basic norms of constitutional adjudication." *Id.*

At the time of Petitioner's trial, *Swain v. Alabama*, 380 U.S. 202 (1965), established the evidentiary standard for an equal protection claim against a prosecutor's racially discriminatory use of peremptory challenges. In order to prevail under that standard, a defendant had to show "that the prosecutor . . . 'in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be,' has been responsible for the removal of qualified blacks who had survived challenges for cause, with the result that no blacks ever served on petit juries." *Teague v. Lane*, 109 S. Ct. 1060, 1066 (1989) (quoting *Swain v. Alabama*, 380 U.S. at 223). In this case, Petitioner asserted his challenge to the prosecutor's discriminatory use of peremptory strikes before trial, during jury selection, on motion for a new trial, and on direct appeal. Under Georgia law at the time of his trial, petitioner adequately preserved his claim for appeal.[6]

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[6] Petitioner was required to satisfy three conditions to preserve his *Swain* claim for appeal. First, he had to raise the issue at trial. *Hammond v. Paul*, 290 S.E.2d 54, 55 (Ga. 1982). Second, his challenge had to be made at the first available opportunity. *Allison v. Fulton-Dekalb Hospital Authority*, 265 S.E.2d 575, 576 (Ga. 1980); *Brackett v. State*, 181 S.E.2d 380, 382 (Ga. 1971). And third, the claim had to be ruled upon by the trial court. *International Association of Bridge, Structural & Ornamental Ironworkers v. Moore*, 254 S.E.2d 438, 443 (Ga. Ct. App. 1979). Petitioner satisfied each of these requirements by: (1) filing a pretrial motion "to restrict the Prosecution from using [its] peremptory challenges in a racially biased manner that

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The Georgia Supreme Court noted in *Allison v. Fulton-DeKalb Hospital Authority*, 265 S.E.2d 575, 576 (Ga. 1980), that "[c]onstitutional challenges should be raised *as soon as the law which is subject to constitutional objection comes to the attention of the challenger's attorney.*" (emphasis added). Anticipating that the prosecutor would use his peremptory challenges in a discriminatory manner, Petitioner's counsel filed a motion prior to voir dire to challenge the practice. Petitioner thus satisfied the Georgia rule "that objections to irregularities must ordinarily be made at a time when they may be remedied, or they are waived." *Castell v. State*, 301 S.E.2d 234, 246 (Ga. 1983). This is confirmed by the fact that the Georgia Supreme Court reached the merits of Petitioner's equal protection claim on his original appeal. *Ford v. State*, 335 S.E.2d 567, 572 (Ga. 1985).[7]

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would exclude members of the black race from serving on the jury," *Ford v. State*, 362 S.E.2d at 765 n.1 (*see also* J.A. 3-4); (2) making a pretrial objection to the prosecutor's discriminatory use of peremptory challenges at an October 12, 1984, evidentiary hearing (J.A. 10-12); (3) apparently moving to forbid the prosecutor's racially discriminatory strikes during jury selection (see page 4 and note 3 *supra*); and (4) raising the claim against discriminatory use of peremptories in a motion for a new trial and on appeal to the Georgia Supreme Court (J.A. 7-8; 17-20). Each motion was denied on the merits.

[7] By deciding the merits of Petitioner's Fourteenth Amendment claim, the Georgia Supreme Court necessarily found that all of the procedural prerequisites for raising that issue on appeal were satisfied. Specifically, the Georgia Supreme Court is "bound by the rule that [it] will *never* pass upon constitutional questions unless . . . the record [is clear]

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After the Georgia Supreme Court's decision, but before Petitioner's judgment of conviction was final, this Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), overturned that portion of *Swain* setting out the evidentiary standard for establishing an equal protection violation. Under *Batson*, a defendant could make out a prima facie showing "of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 96. In this way, *Batson* removed the defendant's burden of having to show that a prosecutor used his peremptory strikes discriminatorily "in case after case" with the result that "blacks never served on petit juries." *Teague, supra* at 1066. Thus, the only effect of *Batson* was to change the evidentiary standard for what previously had been a *Swain* claim.[8]

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that the point was directly and *properly* made in the court below and distinctly passed on by the trial judge." *City of Atlanta v. Columbia Pictures Corp.*, 130 S.E.2d 490, 494 (Ga. 1963) (emphasis added).

[8] 476 U.S. 79, 101 (White, J., concurring). *See also, Teague v. Lane*, 109 S.Ct. at 1066 ("*Batson* . . . overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause"). The Georgia Supreme Court itself recognized this fact in *Cherry v. Abbott*, 371 S.E.2d 852, 853-54 (Ga. 1988), where it ruled that *Swain* was the legal basis for a *Batson* claim.

Other courts in applying *Batson* also have treated it as merely changing the evidentiary standard for a claim under *Swain*. *See United States v. Hamilton*, 850 F.2d 1038, 1039-40 (4th

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Although Petitioner, in challenging the discriminatory use of peremptory challenges, obviously did not rely upon *Batson*, which had not been decided, it cannot be disputed that Petitioner nevertheless adequately alerted the prosecution and Georgia courts to his objection to that practice *in this case*. Thus, in his argument on Petitioner's "Motion to Restrict Racial Use of Peremptory Challenges," defense counsel stated:

> "We are requesting the Court to require the district attorney, if he does use his peremptory challenges to excuse potential black jurors, to justify on the record the reason for his excusing them. *His failure to do so we feel would evidence the*

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Cir. 1988); *United States v. Tucker*, 836 F.2d 334, 337-338 (7th Cir.), *cert. denied*, 109 S. Ct. 143 (1988); *United States v. Gordon*, 817 F.2d 1538, 1541 (1987), *vacated in part on other grounds*, 836 F.2d 1312 (11th Cir. 1988); *United States v. Chalan*, 812 F.2d 1302, 1313-1315 (10th Cir. 1987), *cert. denied*, 109 S. Ct. 534 (1988); *United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir.), *cert. denied*, 483 U.S. 1007 (1987); *Ex Parte Jackson*, 516 So.2d 768, 770 (Ala. 1986); *Fields v. People*, 732 P.2d 1145, 1150 and n.8 (Colo. 1987); *People v. Andrews*, 548 N.E.2d 1025 (Ill. 1989); *Love v. State*, 519 N.E.2d 563, 565 (Ind. 1988); *State v. Hood*, 744 P.2d 816, 819 (Kan. 1987); *State v. Thompson*, 516 So.2d 349, 353 (La. 1987), *cert. denied*, 109 S. Ct. 180 (1988); *Chew v. State*, 562 A.2d 1270, 1271 (Md. 1989); *Taylor v. State*, 524 So.2d 565, 566 (Miss. 1988); *State v. Antwine*, 743 S.W.2d 51, 55 (Mo. 1987), *cert. denied*, 486 U.S. 1017 (1988); *People v. Scott*, 516 N.E.2d 1208, 1210 (N.Y. 1987); *State v. Davis*, 386 S.E.2d 418, 423 (N.C. 1989), *cert. denied*, 58 U.S.L.W. 3769 (1990); *Guy v. State*, 778 P.2d 470, 475 (Okla. Crim. App. 1989); *Commonwealth v. Hardcastle*, 546 A.2d 1101 (Pa. 1988), *cert. denied*, 110 S. Ct. 1169 (1990); *State v. Jones*, 358 S.E.2d 701, 703 (S.C. 1987); *State v. Cantu*, 750 P.2d 591, 596 (Utah 1988); and *Gray v. Commonwealth*, 356 S.E.2d 157, 169-170 (Va.), *cert. denied*, 484 U.S. 873 (1987).

> *fact that he is using them in a discriminatory manner, that is, excusing jurors solely because they are black and for no other reason.*" (J.A. 10) (emphasis added).

Petitioner's argument here unmistakably anticipated the holding in *Batson* that "a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," and that once such a showing is made, "the burden shifts to the State to come forward with a neutral explanation for challenging the black jurors." *Batson*, 476 U.S. at 96, 97.

Indeed, the state clearly understood petitioner's motion as one based on the exercise of peremptories *in this case*. In responding to the petitioner's oral argument in support of the motion to restrict the racial use of peremptories, the prosecutor relied on *Swain* as foreclosing such a challenge in this case. The prosecutor said that *Swain*

> is a Supreme Court case that says, the peremptory challenge system goes back to the common law and it would be an unreasonable burden to require an attorney for either side to justify his use of peremptory challenges; as in fact the purpose of peremptory challenges enables either lawyer to strike somebody because they have blue eyes. If this is the particular reason he wants to do that today, I would appose [sic] the motion. . . . (J.A. 11).

In addition, the Georgia Supreme Court, in rejecting Petitioner's claim under *Swain*, noted that Petitioner had "shown only that a large percentage . . . of black prospective jurors were peremptorily struck by the prosecution in

this case." *Ford v. State*, 335 S.E.2d at 572 (emphasis in original).

Thus, prior to this Court's decision in *Batson*, the prosecutor, the trial judge, and the Georgia Supreme Court all recognized that Petitioner had raised an equal protection challenge to the peremptory exclusion of blacks from the jury in his case. Thus, by failing to reexamine Petitioner's claim under *Batson*, the Georgia Supreme Court has flouted the mandate of this Court. See *Yates v. Aiken*, 484 U.S. 211 (1988)

II. THE DECISION BELOW DOES NOT REST ON ANY INDEPENDENT AND ADEQUATE STATE GROUND FOR AVOIDING THE RETROACTIVE APPLICATION OF *BATSON* IN THIS CASE.

The Georgia Supreme Court ruled that although Petitioner had made a written pretrial objection to the prosecutor's exercise of peremptory challenges to exclude virtually all black veniremen from the jury, Petitioner had not complied with a state procedural rule requiring him to assert the claim after the jury was selected but before it was sworn. However, that rule simply did not exist at the time of Petitioner's trial. Its invocation therefore does not constitute an adequate and independent state ground for the decision below.

It has long been settled that in order to justify a state court's refusal to hear a federal claim, a state procedural bar must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348 (1984). *See. e.g., Williams v. Georgia*, 349 U.S. 375, 382-389 (1955); *Barr v. City of Columbia*, 378 U.S. 146, 149-150 (1964); *Hathorn v. Lovorn*,

457 U.S. 255, 262-265 (1982). Except where a state procedural rule provides an adequate as well as an independent ground for decision, the "general and necessary" principle is that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). The "state procedural bar" invoked by the Georgia Supreme Court on remand (362 S.E.2d at 766) violates this principle for two basic reasons.

First, the *Sparks* procedure was expressly announced as a prospective rule. 355 S.E.2d at 659 ("we hold that *hereafter* any claim under *Batson* should be raised [at a specified] . . . time") (emphasis added). In the *Sparks* case itself, that procedure was not applied retroactively to bar a *Batson* claim raised by a litigant in a posture less compelling than Petitioner's. And so far as Petitioner is aware, the Georgia Supreme Court has never applied *Sparks* retroactively in any case other than his.[9] Its

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[9] *Riley v. State*, 355 S.E.2d 66 (Ga. 1987), which was mentioned by the Georgia Supreme Court, presents a completely different situation. Riley made no pretrial motion to restrict the prosecutor's racially discriminatory use of peremptory strikes. After Riley's jury was selected but before trial began, the trial judge expressly offered Riley an opportunity to make motions or objections directed to the panel. He made none. Then, after a day of trial during which five witnesses testified, Riley belatedly moved for a mistrial because of the prosecutor's biased use of peremptories. The trial judge held the motion untimely, and the Georgia Supreme Court agreed. *Riley* is a straightforward case of untimely objection under *Allison v. Fulton-DeKalb*

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retroactive application as a procedural bar thus has no footing in any state-law rule that "has been consistently or regularly applied" by the Georgia courts. *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988).

Second, as the dissenting Justices below pointed out, "the procedural rule on which the majority relies to avoid reaching the merits of Ford's *Batson* claim did not exist when Ford's case was tried." 362 S.E.2d at 767 (Gregory, J., dissenting); *accord*, *State v. Sparks*, 355 S.E.2d at 659 ("there have been no judicial guidelines regarding the time and manner in which such a claim is to be presented"). To the contrary, the only pertinent procedural requirement at that time was the rule of *Allison v. Fulton-DeKalb Hospital Authority*, *supra*, and similar cases, requiring that constitutional claims be raised at the first opportunity. Thus, when Ford made his pretrial motion to preclude unexplained prosecutorial peremptory strikes of black veniremen, "Ford had no way of knowing but what if he had waited until after the jury was selected to raise the issue, we [the Georgia Supreme Court] would have held that he waited too late." 362 S.E.2d at 767.

Georgia is, of course, wholly free to announce new procedures for raising *Batson* claims in its courts, so long as it applies those procedures prospectively. But retrospective application of the new procedures to litigants who "could not fairly be deemed to have been apprised of [their] . . . existence" does not constitute an adequate

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Hospital Authority, *supra*, and cognate cases, which require that constitutional claims be raised as soon as a party becomes aware of the basis for them.

state ground for denying the constitutional rights vouchsafed by *Batson* and *Griffith*. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964); *see also Staub v. City of Baxley*, 355 U.S. 313, 320 (1958); *Wright v. Georgia*, 373 U.S. 284, 289-291 (1963); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam).

The Georgia courts' handling of Petitioner's challenge to the racial use of peremptory strikes evidences the novelty of the Georgia Supreme Court's ruling. The issue of a procedural bar was never raised at the trial level, nor on direct appeal. It was only after the state supreme court was faced with this Court's remand order to apply *Batson* to facts that rather clearly established a prima facie denial of equal protection, that the first mention was made of any state procedural rule that supposedly barred consideration of Petitioner's claim.[10]

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[10] By rejecting Petitioner's equal protection claim on an issue that was not raised either at trial or in any of the lower state court proceedings, the Georgia Supreme Court also ignored a bedrock principle of Georgia law. Namely, under Georgia law, "[t]here is no more fundamental principle of appellate practice . . . than that which precludes review of matters not placed in issue at the trial level." *Hall v. Robinson*, 300 S.E.2d 521, 524 (Ga. Ct. App. 1983). Thus, a "defense [not] advanced in the court below . . . may not now be considered on appeal," *Gator Express Service, Inc. v. Funding Systems Leasing*

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As the undisputed facts demonstrate, this is not a case in which Petitioner has tried to sandbag the prosecution by withholding a claim until late in the proceedings, or in which he failed to alert the prosecutor and trial court to a constitutional defect which, with proper notice, could have been avoided or cured.[11] *Cf. Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977). The prosecutor and the trial judge understood the basis for Petitioner's claim, even before jury selection commenced. Consequently, the state cannot now saddle Petitioner with a duty under a procedural rule that did not exist at the time of his trial. *Osborne v. Ohio*, 110 S. Ct. 1691 (1990).

The Georgia Supreme Court has suggested that the question presented in this case is "whether our contemporaneous objection rule is a valid state procedural bar to Ford's Batson complaint." *Ford v. State*, 362 S.E.2d at 766. To the contrary, the real question is whether a novel

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Corp., 279 S.E.2d 332, 333 (Ga. Ct. App. 1981), nor can a party "during the trial ignore that which he thinks to be error or an injustice, take his chance on a favorable verdict, and complain later." *Gilreath v. State*, 279 S.E.2d 650, 662 (Ga. 1981), *cert. denied*, 456 U.S. 984 (1982) (*quoting Joyner v. State*, 67 S.E.2d 221, 224 (Ga. 1951)). This same principle prevents the Georgia Supreme Court from interposing a procedural bar for the first time on remand to avoid reconsideration of Petitioner's claim under the evidentiary standard established in *Batson*.

[11] This is clear not only from the judge's ruling on Petitioner's written motion, but also from his later indication, after the trial had commenced, that in his view the prosecutor's use of 9 of his 10 peremptory challenges to exclude blacks did not call for any explanation by the prosecutor of that pattern of strikes. (J.A. 16).

procedural rule, not well-established under state law, can be announced and retroactively applied so as to foreclose the vindication of federal constitutional rights that were plainly asserted at trial. The answer to *that* question is obvious. *See, N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) ("such a local procedural rule, although it may now appear in retrospect to form a part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence."); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964); *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988) *see also, Wright v. Georgia*, 373 U.S. 284, 289-91 (1963); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam). These decisions make clear that the state procedural ground invoked by the court below to avoid reviewing Petitioner's constitutional claim is not "adequate" and accordingly the decision of the Georgia Supreme Court cannot stand.

CONCLUSION

The judgment of the Georgia Supreme Court should be reversed and that court should be instructed to remand this case to the trial court for proceedings consistent with *Batson v. Kentucky*.

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No. 87-6796

In The

Supreme Court of the United States

October Term, 1990

JAMES A. FORD,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Georgia

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I.

Where Petitioner never objected at trial to the prosecutor's actual use of peremptory strikes or to the actual jury composition, is the decision of the Georgia Supreme Court, finding the *Batson* issue was not preserved for review, consistent with *Griffith v. Kentucky*?

II.

Does the procedural bar as applied by the Georgia Supreme Court in this case, resting upon Petitioner's lack of trial objection, constitute an independent and adequate state ground?

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BRIEF FOR RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, James A. Ford, was indicted by the Coweta County, Georgia, grand jury on September 5, 1984, for the February 29, 1984, malice murder of Sara Dean (count 1); the rape of Sara Dean (count 2); the kidnapping of Sara Dean (count 3); the armed robbery of Sara Dean (count 4); and the burglary of the J & L Oil Company (count 5). (Record 4-6). On September 7, 1984, the state gave written notice of its intent to seek the death penalty and the underlying statutory aggravating circumstances

which the state would seek to prove. (Record 13-14). Accordingly, the case was tried under Georgia's Unified Appeal Procedure, with pretrial hearings being held on September 7 and 21, 1984, and October 12, 1984.

On October 9, 1984, counsel for Petitioner, Arthur B. Edge, IV, filed a "motion to restrict racial use of peremptory challenges." (Record 49; JA 3-4). In this pretrial motion Petitioner alleged that the prosecutor "has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race." *Id.* Petitioner further "*anticipated* that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes." *Id.* (Emphasis added). Petitioner requested a pretrial order prohibiting the prosecutor from using challenges "in a racially biased manner." *Id.*

The pretrial motion was argued at the October 12, 1984, motions hearing wherein Petitioner orally requested that the prosecutor be required to "justify on the record the reason" for the prosecutor striking black potential jurors. (10/12/84 Motions Transcript 160-61; JA 10) (hereinafter M.T.). The trial court denied the motion. *Id.*

At the jury trial on October 22-25, 1984, Petitioner never reasserted the motion to restrict the prosecutor's use of strikes. The motion was not raised by Petitioner prior to, during or after voir dire. (Trial Transcript 3-160) (Hereinafter referred to as "T"). The actual striking of the jury is not recorded. (T. 166; JA 12-13). The jury was selected and sworn, then sequestered while additional bailiffs were sworn. Afterwards, the jury was brought in

and advised they would be sequestered for the trial which would begin the following day. (T. 166-67; JA 13-14). The trial court asked counsel for Petitioner if there were anything the court needed to address, and counsel replied no. (T. 170; JA 14). Counsel for Petitioner stated that he would be ready to try the case in the morning. *Id.* Court was recessed for the day. *Id.*

On the second day of trial, October 23, 1984, both sides gave opening statements, and the state presented eight witnesses prior to the noon recess. (T. 171; 175; 202; 206; 215; 219; 221; 227; 233; 244; 250; 268). Prior to beginning the afternoon session, in a recorded conference in chambers, the trial court placed two matters on the record. (T. 268; JA 15). The trial court ascertained the views of the parties on permitting jurors to vote in a local election that day. (T. 268-70). Secondly, the trial judge stated the following:

> One other matter we need to take up. One of Mr. Edge's motions was to the State's using all their strikes to strike blacks from being on the jury; no whites being struck, all blacks being struck. I think the record should reflect that of the strikes the State used, it did not strike all the blacks. There's a black on the jury.

(T. 270; JA 15). Counsel for Petitioner then noted for the record that according to his count, the state had used nine of its ten peremptory challenges on black veniremen. *Id.* The trial court agreed and noted that the one black venireman which the prosecutor did not strike was serving on the jury and that the potential black alternate juror which the state did not strike was struck by Petitioner. (T. 270-71; JA 15). The trial judge summarized the following:

> That's what happened in the jury selection process. I just think that needs to be put in since that motion was made. Of course, the motion has been denied. It doesn't matter now but I think just for the record's sake that ought to be done. You all can go in and set up and we'll be ready to go shortly.

(T. 271; JA 15-16).

At that point the prosecutor asked if it would "be appropriate" for the state to make any showing of the reasons for the strikes used. *Id.* The trial court replied, "I'm not asking for it." *Id.* The trial resumed with Petitioner never making any objection to the jury actually selected. *Id.*

Upon the conclusion of the guilt/innocence phase, the jury returned a verdict of guilty on all five counts on October 24, 1984. (Record 86). The following day, after completion of the sentencing proceeding, the jury found the existence of four statutory aggravating circumstances and returned a binding recommendation that Petitioner be sentenced to death for murder. (Record 97). On that same date the trial court sentenced Petitioner to death for the malice murder, to a consecutive life sentence for the rape, to a consecutive life sentence for the kidnapping, and to a consecutive life sentence for the armed robbery, and to a consecutive sentence of twenty years imprisonment for burglary. (Record 100-101).

On November 26, 1984, new counsel entered the case on Petitioner's behalf. Attorney Nelson Jarnagin filed an entry of appearance on that date and filed a motion for new trial raising only the general grounds. (Record 102, 105; JA 5). The motion of trial counsel Edge to withdraw

was granted by the trial court on November 27, 1984. (Record 107-109).

On January 7, 1985, new counsel for Petitioner filed an amendment to the motion for new trial raising, among other issues, a claim that Petitioner's "right to an impartial jury as guaranteed by (sic) Sixth Amendment to the United States Constitution was violated by the prosecutor's exercise of his peremptory challenges on a racial basis" and that Petitioner received ineffective assistance of counsel at trial. (R. 111-12; JA 7-8). The hearing on the motion for new trial was held on January 18, 1985, where trial counsel was called as a witness and testified on the ineffectiveness issue. (Motion for New Trial 1; 49-57) (hereinafter MNT).

At the motion for new trial hearing, new counsel for Petitioner asserted that trial counsel had allegedly reasserted the motion to restrict the prosecutor's use of strikes at page 161-62 of the trial transcript. (MNT 31; JA 17). However, this is an error as this colloquy concerned the motion for change of venue which the trial court denied. (T. 162). New counsel for Petitioner also claimed at the motion for new trial hearing that trial counsel had reasserted the objection at pages 270-71 of the trial transcript. (MNT 32; JA 17). However, this is a reference to the colloquy which occurred after lunch recess on the second day of trial. New counsel for Petitioner asserted that that Second Circuit opinion in *McCray v. Abrams*[1] on December 4, 1984, constituted a change in the previous standard of *Swain v. Alabama*, 380 U.S. 202 (1965), regarding the prosecutor's use of strikes. (MNT 34; JA 19). Trial

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[1] *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984)

counsel was never questioned by new post-trial counsel regarding the prosecutor's use of strikes nor trial counsel's satisfaction or dissatisfaction with the trial jury actually selected. (MNT 49-57). The trail court ultimately denied the amended motion for new trial on February 19, 1985. (Record 244; JA 9).

On October 29, 1985, the Supreme Court of Georgia affirmed Petitioner's convictions and sentences. *Ford v. State*, 255 Ga. 81, 355 S.E.2d 567 (1985) (JA 22). The appellate court specifically found that Petitioner had failed to establish systematic exclusion of black jurors. *Ford*, 255 Ga. at 83(1) (JA 25).

In his first petition for a writ of certiorari, Petitioner prayed that this Court hold this case pending decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). On February 23, 1987, this Court granted certiorari, vacated judgment and remanded this case to the Georgia Supreme Court for further consideration in light of *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987). (JA 49).

In an opinion dated November 30, 1987, the Supreme Court of Georgia found that Petitioner had failed to make any objection to the prosecutor's use of peremptory challenges regarding the jury actually selected at trial so that the *Batson* claim was not preserved for review on the merits. *Ford v. State*, 257 Ga. 661, 362 S.E.2d 764 (1987). (JA 50).

Petitioner thereafter filed the underlying petition for a writ of certiorari to this Court raising three questions: (1) whether the Georgia Supreme Court could avoid compliance with the remand by declaring that a pre-*Batson* challenge was a different constitutional claim than *Swain*;

(2) whether retroactive application of *Batson* could be avoided by envoking an allegedly previously-unannounced procedural bar; and (3) whether the Sixth Amendment fair cross-section requirement barred the prosecutor's alleged racial use of peremptory challenges. On April 23, 1990, this Court granted certiorari as to questions one and two and specifically declined to grant certiorari on question three. (JA 59). This brief on the merits on behalf of the State follows.

SUMMARY OF THE ARGUMENT

The critical issue for resolution in this case is whether a defendant, who made a pretrial motion "anticipating" that the prosecutor might use his strikes in a racially discriminatory manner but who does not renew that motion after the prosecutor has exercised his peremptory challenges or otherwise voice any objection at any point during trial to the jury as selected, is entitled to litigate on the merits a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Georgia Supreme Court properly found that under the facts of this case, Petitioner failed to preserve the *Batson* issue for review due to the lack of any objection by Petitioner at trial to the prosecutor's actual use of strikes. The State submits that this decision of the Supreme Court of Georgia is not inconsistent with nor violative of the remand order in this case as *Griffith v. Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987), and *Brown v. United States* both involved criminal defendants who at trial, after the prosecutors used their allotted peremptory challenges, specifically objected to the manner in which the strikes were used.

The State further submits that a *Batson* claim inherently does not arise until after the prosecutor has exercised his or her peremptory challenges at the particular defendant's trial. Particularly here, where Petitioner admittedly did nothing more than "anticipate" that the prosecutor might utilize his peremptory challenges in an allegedly discriminatory manner, it was incumbent upon Petitioner to object in some fashion to the jury *actually selected after* the prosecutor had in fact utilized his strikes. The State submits that the decision of the Supreme Court of Georgia, in declining to excuse Petitioner from this critical failure to object, is not unreasonable.

The State further submits that the procedural bar relied upon by the Supreme Court of Georgia in this case constitutes an independent and adequate state ground. An appropriate objection to the jury actually selected following the prosecutor's use of peremptory challenges enables the trial court to take remedial action.

The essence of Petitioner's complaint is the application of any procedural bar to his case. The State submits, however, that *Batson* is not so novel that prior to its pronouncement Petitioner possessed no legal basis for objecting to the prosecutor's actual use of strikes at trial after the exercise of those strikes.

Contrary to Petitioner's representations, the state appellate court did not rely upon the procedural bar solely in an effort to avoid deciding a federal question; rather, the state appellate court had previously decided the issues of timeliness and the method by which a *Batson* challenge must be preserved so that those principles were merely applied in this case without readjudication. The

major premise of the decision of the Supreme Court of Georgia on remand is Petitioner's lack of trial objection to the jury actually selected. Under these facts, the State submits that there is no federal constitutional question for decision by this Court.

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF GEORGIA, IN FINDING THE *BATSON* ISSUE WAS NOT PRESERVED FOR REVIEW DUE TO THE LACK OF ANY TRIAL OBJECTION, IS NOT INCONSISTENT WITH *GRIFFITH* OR *BATSON*.

Petitioner initially contends that the Supreme Court of Georgia "apparently acted on the mistaken notion" that a challenge to the prosecutor's use of peremptory strikes under *Swain* is different from *Batson*. Petitioner contends that *Griffith* "makes clear" that no such distinction exists. Petitioner asserts that *Griffith* held that all pending *Swain* claims in all cases not yet "final" should, as a matter of law, be treated automatically as *Batson* claims, without any inquiry into the underlying facts of each case. The State submits that Petitioner overstates this Court's holding in *Griffith* and that the broad question of whether *Swain* claims are, as a matter of law, the equivalent of *Batson* claims has not previously been decided. This broad question need not be reached, however, due to the presence of an underlying factual issue which is dispositive of this case. The State submits that the more narrow question for resolution in this case is whether a *Swain* claim is, as a matter of fact, the legal equivalent of a *Batson* claim where, as here, Petitioner

never made an objection to the prosecutor's actual use of strikes at Petitioner's own trial nor to the actual jury empaneled to try his case. The dispositive nature of this factual distinction is apparent from a review of *Batson* and its progeny.

In *Batson* itself, "Defense counsel moved to discharge the jury before it was sworn on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws." *Batson*, 476 U.S. at 83. Batson's request for a hearing on his motion was denied by the trial court. *Id.* On review this Court noted that since *Swain*, the Court "had recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case.*" *Batson*, 476 U.S. at 95. (Emphasis in original). This Court then set forth the components of a prima facie case which must be established by a defendant before the prosecutor is required to give race-neutral reasons for the exercise of his peremptory strikes. *Id.* at 96-97. This Court noted:

> We decline, however, to formulate particular procedures to be followed upon a defendant's *timely objection* to a prosecutor's challenges.

Batson, 476 U.S. at 99. (Emphasis added). In a footnote, this Court stated that it would "make no attempt to instruct" the state and federal trial courts on how to implement *Batson* because of the varied jury selection practices. *Id.*

Subsequent cases addressing *Batson's* applicability have involved either a contemporaneous objection at trial by the defendant to the prosecutor's use of strikes or a determination that no claim had been previously raised under *Swain*.

Specifically, in *Allen v. Hardy*, 478 U.S. 254 (1986), wherein this Court held *Batson* would not apply retroactively to cases on collateral review, even that defendant, apparently during jury selection and after the prosecutor had exercised nine of his seventeen strikes in a specific manner, "moved to discharge the jury" on the basis that the prosecutor's use of strikes had denied the defendant his right to be tried by an impartial jury drawn from a fair cross section of the community.

In *Griffith* counsel for the defendant, following the prosecutor's use of strikes, "expressed concern that Griffith was to be tried by an all-white jury . . . [and] asked the court to request the prosecutor to state his reasons for exercising peremptory challenges against the four prospective black jurors." *Griffith*, 107 S.Ct. at 710. Defense counsel thereafter moved to discharge the panel on the basis that the prosecutor's use of strikes violated the defendant's Sixth and Fourteenth Amendment rights. *Id.* Similarly, in the companion case to *Griffith*, *Brown v. United States*, after the prosecutor had used two strikes upon two black veniremen, the defendant "objected to the prosecutor's use of peremptory challenges to strike the black persons from the jury. . . . " Thus, in the two decisions in which this Court announced the rule that *Batson* would apply retroactively "to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a

'clear break' with the past," *Griffith*, 107 S.Ct. at 716, each defendant expressly objected to the prosecutor's use of strikes after those strikes had been utilized.

Finally, in *Teague v. Lane*, ___ U.S. ___, 109 S.Ct. 1060, 1066 (1989), this Court noted that *Batson* "overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause." This Court made no reference to whether Teague had made a timely objection to the prosecutor's use of strikes, as had been specifically noted in *Batson*. This Court did note, however, that Teague's challenge to the prosecutor's use of strikes under *Swain* was procedurally defaulted under Illinois law as he had not raised that claim at trial or on direct appeal. 109 S.Ct. at 1067-1068.

The instant case presents a factual scenario significantly different from the above-cited cases. In this case, Petitioner raised a challenge prior to trial to the prosecutor's use of peremptory strikes, with Petitioner specifically "anticipating" that the prosecutor might utilize those strikes in a racially discriminatory manner at trial. However, the record contains no objection voiced by Petitioner at any time prior to, during or after voir dire or at any time prior to, during or after jury selection or at any later point in the trial, to the prosecutor's actual use of his strikes. In fact, the State strongly disagrees with Petitioner's assertion that he made objection during jury selection. As will be discussed more substantively below, Georgia law requires that any such objection, if made, shall be transcribed and made a part of the record. No such objection appears in the record. Further, the Supreme Court of Georgia specifically found as a matter

of fact that no objection was made by Petitioner to the jury actually selected.

By way of background, a Georgia criminal defendant on trial for a capital offense is given twenty peremptory challenges while the prosecutor is given only one-half that number, ten. O.C.G.A. § 15-12-165. If a potential juror is subsequently qualified and is not struck by the state, the juror is placed upon the accused and unless struck by the accused "shall be sworn to try the case." O.C.G.A. § 15-12-166. Any objection to a juror for cause "shall be made before the juror is sworn in the case." O.C.G.A. § 15-12-167. "Theoretically, the parties could seat a jury of twelve without any strikes being exercised, but, nevertheless, a panel of at least forty-two qualified jurors must be offered for consideration." *Aldridge v. State*, 258 Ga. 75, 78, 365 S.E.2d 111 (1988). Two alternates are then selected with the defendant having four strikes and the state two. O.C.G.A. § 15-12-169; *Aldridge v. State*.

Georgia law further provides that "all motions, colloquies, objections, rulings, evidence (whether admitted or stricken on objection or otherwise), copies or summaries of all documentary evidence, the charge of the court, and all other other proceedings which may be called in question on appeal or other posttrial procedure shall be reported. . . . " O.C.G.A. § 5-6-41(d). Any objections or motions during voir dire and subsequent rulings must be and are reported under this code section as they may be matters which may be raised on appeal. *State v. Graham*, 246 Ga. 341, 271 S.E.2d 627 (1980).

The actual striking of the jury in this case is not recorded, but Petitioner now asserts he renewed his pre-

trial motion during jury selection. The record contradicts this assertion, and the Supreme Court of Georgia found as fact the absence of any such objection in this case. *Ford*, 257 Ga. at 663. (JA 54). Petitioner asks this Court to assume that he must have made such an objection in light of the subject of the recorded conference in chambers on the second day of the trial in which the trial court placed the racial composition of the jury empaneled in this case on the record. (T. 270-71; JA 15-16). The record does not show that this matter was placed on the record at Petitioner's insistence nor has Petitioner's trial counsel, nor anyone else, ever testified that it was. The State submits that Petitioner's lack of objection to the jury actually selected is pivotal to this Court's resolution of the issues presented in this case.

Petitioner also contends before this Court that he somehow complied with Georgia law regarding contemporaneous objections. The State submits, however, that Petitioner's assessment of Georgia law is not entirely accurate, especially when Petitioner cavalierly interweaves civil cases which are not applicable in a criminal setting and sets forth a three pronged test for preservation of issues which has never been adopted by a Georgia reviewing court. The State further submits that a review of Georgia law on raising and preserving issues is beneficial in determining whether the Georgia Supreme Court was reasonable in requiring Petitioner to have voiced some objection to the prosecutor's actual use of strikes at Petitioner's own trial in order to preserve any *Batson* claim.

Petitioner's trial occurred in October 1984. At that point, the Unified Appeal Procedure had been in effect

for approximately four years as the Unified Appeal Procedure (hereinafter UAP) is required to be followed in every case in which the death penalty is sought on an indictment returned after August 25, 1980. *Brown v. State*, 250 Ga. 66, 72, 295 S.E.2d 727 (1982). The UAP Outline of Proceedings and Checklist was first published in 1980 in the Appendix of Volume 246 of the *Georgia Reports*. (246 Ga. A-1). Petitioner's trial counsel was given a copy of the UAP at the first pretrial hearing on September 7, 1984. (9/7/84 M.T. 3; Copy of UAP appended at page 6). At the second pretrial hearing on September 17, 1984, Petitioner's trial counsel acknowledged he had received a copy of the UAP at the first hearing but noted he had also had a copy of the UAP "sometime prior to that" which counsel had reviewed prior to filing any motions in this case. (9/17/84 M.T. 18).

The UAP contains both an Outline of Proceedings and a Checklist which "are intended to assist [defense counsel] in protecting the defendant's rights, but it remains the responsibility of defense counsel to protect those rights . . . " *Brown v. State*, 250 Ga. at 72(3), *quoting* Outline of Proceedings Rule IA (3) of the UAP. The Checklist includes potential issues which could be raised at particular points during the pretrial or trial proceedings. Two purposes of the "Outline of Proceedings" are to "make certain that all matters which possibly could be raised on behalf of the defendant have been considered by the defendant and his attorney and either asserted in a timely and correct manner or knowingly, voluntarily and intelligently waived" as well as "prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may

occur." (246 Ga. A-5). Purposes of the Checklist include alerting the court, defense counsel and the prosecutor to "general and specific categories of error" which should be avoided and noting that some of the errors "traditionally or necessarily occur at particular stages of the case," with the Checklist not raising "every error which may occur." (246 Ga. A-5, A-6). Under the Review Proceedings, IV A, 2(a), the UAP provides that the rules are not to be construed as to restrict or limit issues but that it is "the purpose of these rules to insure that as many issues as possible which heretofore could be raised by a writ of habeas corpus or other post-trial procedure were timely raised prior to or during trial." (246 Ga. A-13). The UAP copy actually provided to trial counsel in this case contains among the Checklist of potential issues *Swain v. Alabama* under the section regarding jury challenges to the array. (UAP, p. 8; appended at p. 6 of 9/7/84 M.T.).

In addition to the UAP procedure for capital cases, the Georgia habeas corpus statute was amended in 1982 to provide as follows:

> The [habeas corpus] court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted.

O.C.G.A. § 9-14-48(d); 1982 Ga. Laws p. 786. This amendment became effective on April 13, 1982, but is not

applicable to petitions filed before January 1, 1983. *Valenzuela v. Newsome*, 253 Ga. 793, 797, 325 S.E.2d 370 (1985).

Thus, the combination of the UAP and the 1982 amendment constituted Georgia's "complement of procedural rules" which sought to channel at Petitioner's 1984 trial "to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

Against this backdrop, Petitioner's trial counsel filed a pretrial motion in which he "anticipated" that the prosecutor would use his strikes in an allegedly discriminatory manner. Petitioner produced no evidence of this motion, resulting in its pretrial denial. What the Supreme Court of Georgia declined to excuse was Petitioner's failure to voice, after the prosecutor had in fact used his ten peremptory challenges, any dissatisfaction with the jury actually selected or the manner in which the prosecutor actually utilized those strikes at Petitioner's trial. Contrary to Petitioner's assertions, assumptions and sheer speculation, the record here contains no evidence and no factual findings that Petitioner ever objected during the trial to the manner of selection, nor to the composition, of his trial jury.

On remand, the Georgia Supreme Court correctly interpreted *Batson* as requiring that an objection to the prosecutor's use of strikes "be made *before* the trial of the case begins." *Ford*, 257 Ga. at 661 (JA 51). (Emphasis in original). The state appellate court found further support for this position in *Griffith* itself where, as previously

noted, the defendant in *Griffith* had moved to discharge the jury panel following the prosecutor's use of strikes. The Georgia Supreme Court found that while Petitioner had filed a pretrial motion challenging the prosecutor's anticipated use of strikes, Petitioner at the pretrial hearing failed to offer any proof showing systematic exclusion. *Ford*, 257 Ga. at 661-662 (JA 53). The Georgia Supreme Court further found that after the jury had been selected and sworn, defense counsel was given an opportunity by the trial court to make an objection to the jury selection process, but defense counsel declined to make any objection. *Id.* The State submits these factual findings are correct and amply supported by the record.

The Georgia Supreme Court then noted that while Petitioner could claim under *Griffith* that *Batson* applied to his case, *Griffith* itself had not expressly held that a defendant who fails to make an objection at trial to the actual use of strikes by the prosecutor would nonetheless be entitled to relief. *Ford*, 257 Ga. at 662. (JA 53). The court then noted that it had already determined in a previous case that point in time when a *Batson* challenge should be raised, with that decision being *State v. Sparks*, 257 Ga. 97, 98, 355 S.E.2d 658 (1987). The Georgia Supreme Court then found as fact:

> Ford made no contemporaneous objection to the composition of the jury as selected. His pre-trial motion was not an objection to the jury as selected, but to an alleged pattern of systematic exclusion of black jurors. There was no objection made after the jury was sworn.

Ford, 257 Ga. at 663 (JA 54). The court then noted that "even if colloquy in the trial judge's chambers on the

second day of trial might be interpreted as a *Batson* motion, it would not have been timely under *Riley v. State* [257 Ga. 91, 94(3), 355 S.E.2d 66 (1987)]." *Id.* The court concluded that Petitioner's *Batson* claim was not timely "where Ford made no objection to the composition of the jury after it was selected and before the trial commenced." *Ford*, 257 Ga. at 664 (JA 55).

The State submits that the Georgia Supreme Court correctly determined that *Griffith* did not hold that all pretrial *Swain* claims which were not renewed at trial are nonetheless entitled to be treated as *Batson* claims. *Ford*, 257 Ga. at 662 (JA 53). Rather, as noted above, *Griffith* and *Brown* both involved contemporaneous objections to the prosecutor's use of peremptory strikes after those strikes were utilized. Thus, the State submits that the interpretation which the Georgia Supreme Court gave *Griffith* – i.e., "all that *Griffith* dictates is that objections made – at trial – must be resolved under the *Batson* rule," was not inconsistent with the remand in this case. *Ford*, 257 Ga. at 662 (JA 53). This Court itself noted in *Batson* that the Court would not promulgate rules of state or federal procedure in order to resolve *Batson* claims. For these reasons, the State submits that the Georgia Supreme Court did not fail to comply with the remand order in this case.

II. THE GEORGIA PROCEDURAL BAR AS APPLIED IN THIS CASE IS AN INDEPENDENT AND ADEQUATE STATE GROUND.

In the second issue presented to this Court for review, Petitioner contends that the Georgia Supreme Court's reliance upon a specific state procedural rule

delineating when a *Batson* claim is timely fails to constitute an independent and adequate state ground. The State submits that the decision of the Georgia Supreme Court rested upon the fact that Petitioner had failed to object at trial to the prosecutor's use of strikes and, in concluding that the *Batson* claim was not preserved for review, the court simply relied upon two cases in which it had already determined and articulated the method of preservation and the issue of timeliness. The State further submits that a review of the decisions of the Georgia Supreme Court dealing with *Batson* will show that the procedural bar in this case constitutes an independent and adequate state ground.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court noted that it had relied upon various principles in determining whether a state procedural bar constituted an independent and adequate state ground and that the Court had "thus far not developed a satisfying consistent approach for resolving this vexing issue." Under *Henry v. Mississippi*, 379 U.S. 443 (1965), this Court has examined whether a state procedural rule served "a legitimate state interest." Most recently, in *Johnson v. Mississippi*, ___ U.S. ___, 108 S.Ct. 1981 (1988), this Court examined whether a procedural rule was "strictly or regularly followed" to determine whether it was adequate, *citing Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). The State submits that under either approach, the rule relied upon by the Georgia Supreme Court in this case is constitutionally adequate.

The State submits that a review of Georgia law shows that the state appellate court was not merely relying upon a rule which was announced after Petitioner's trial in

order to avoid deciding a federal question. Rather, the court had already decided the issue presented in the instant case – i.e., whether the lack of a trial objection to the prosecutor's actual use of strikes preserves a *Batson* claim, and instead of readjudicating the issue anew, simply relied instead upon the two cases in which these same issued had already been decided.

Petitioner's case was the eighth case in which the Supreme Court of Georgia dealt with the applicability, if any, of *Batson*. The first appearance of *Batson* was in the context of a successive state habeas corpus petition filed by a death-sentenced petitioner, and the Georgia Supreme Court declined to apply *Batson* retroactively, especially where no *Swain* challenge had been previously raised. *Bowden v. Kemp*, 256 Ga. 70, 344 S.E.2d 233 (1986). In the second appearance of *Batson*, the state appellate court concluded that a white defendant had no standing to raise a *Batson* challenge. *Pope v. State*, 256 Ga. 195, 345 S.E.2d 831 (1986).

In the third appearance of *Batson*, the state appellate court granted certiorari and affirmed the decision of the Court of Appeals of Georgia holding *Batson* applied under *Griffith*. *State v. Mincey*, 256 Ga. 636, 353 S.E.2d 814 (1987). However, that decision is not inconsistent with the decision in this case as, "At the conclusion of the jury selection process, defense counsel moved for a continuance on the basis that the District Attorney's systematic striking of all blacks on the forty-two-member panel denied the defendant the right to a jury of his peers." *Mincey v. State*, 180 Ga. App. 263, 264, 349 S.E.2d 1 (1986). Here, Petitioner made no objection at trial, thus giving no

indication of any dissatisfaction with the prosecutor's actual use of strikes.

In the fourth appearance of *Batson*, a defendant did not raise a motion for mistrial based on the prosecutor's use of strikes until the second morning of trial; on the day before, defense counsel stated he had no motions or matters to bring up after the jury was selected and sworn, opening statements were given, five witnesses were called to testify and then the trial was recessed for the day. *Riley v. State*, 257 Ga. 91, 94, 355 S.E.2d 66 (1987). In *Riley*, the state appellate court found the challenge was not timely raised so that the *Batson* issue was not preserved for review.

State v. Sparks is the fifth case in which the state appellate court considered the applicability of *Batson*. In *Sparks*, the Georgia Supreme Court granted certiorari to the Georgia Court of Appeals to determine whether a *Batson* challenge had been timely raised. In *Sparks*, the record shows that after voir dire, the jury was selected, sworn, given preliminary instructions and then excused for lunch. *Sparks*, 257 Ga. at 98. After lunch recess and a hearing on an unrelated motion, the defense then made a motion for mistrial based upon the prosecutor's use of strikes to exclude black veniremen. *Id*. The Georgia Supreme Court remanded *Sparks* for a *Batson* hearing, concluding that the motion was made relatively promptly, particularly when no decision up until that time had required that a *Batson* challenge be raised prior to the jury being sworn. The court held specifically in *Sparks* that "hereafter any claim under *Batson* should be raised *prior to the time the jurors selected to try the case are sworn.*" *Sparks*, 257 Ga. at 98. (Emphasis added).

In the sixth appearance of *Batson*, a death penalty case tried in May 1985, the *Batson* claim was not raised until after trial. The court concluded the issue was not timely raised and not preserved for review. *Childs v. State*, 257 Ga. 243, 257(21), 357 S.E.2d 48 (1987).

In the seventh appearance of *Batson*, the state appellate court found that *Batson* had been decided twelve days prior to the beginning of voir dire in that case and that the prosecutor's proffered reasons in rebuttal after a *Batson* challenge were not sufficiently race-neutral. *Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987). The murder conviction and death sentence were reversed.

Petitioner's case was the next case decided by the state appellate court addressing *Batson*. As previously noted, the court found as a predicate matter that Petitioner voiced no objection, contemporaneous or otherwise, to the prosecutor's actual use of strikes. *Ford*, 257 Ga. at 663. (JA 54). Then, even alternatively construing the recorded colloquy in chambers on the second day of trial regarding the racial composition as a motion by Petitioner, the court deemed the issue untimely. *Id*.

There can be no question of the legitimacy of the rule announced by the Georgia Supreme Court in *Sparks* – i.e., that a *Batson* objection must be raised prior to the time the jury is sworn. *Sparks*, 257 Ga. at 98. This is consistent with other Georgia law regarding jury selection, such as requiring that challenges to the grand jury array be filed prior to indictment or challenges to the traverse jury array shall be filed at trial when the array is "put upon him." O.C.G.A. § 15-12-162; *Alderman v. State*, 254 Ga. 206,

327 S.E.2d 168 (1985). As previously noted, "any objections to a juror for cause shall be made before the juror is sworn in the case." O.C.G.A. § 15-12-167. Requiring that a challenge be made before the jury is sworn also avoids questions of whether double jeopardy has attached. Thus, the rule announced in *Sparks* is not a radical, unforeseeable departure from other Georgia rules regarding jury challenges. Quite the contrary, it naturally follows.

The State submits that unlike *Barr v. City of Columbia*, the other cases decided by the Georgia Supreme Court prior to Petitioner's case are consistent with the decision reached by the Georgia Supreme Court in Petitioner's case. Petitioner does not question the legitimacy of a rule requiring that a *Batson* claim be raised before the jury is sworn so that the trial court at that point may take remedial action. *Cf. Henry v. Mississippi*. Rather, Petitioner complains of the application of that rule in his case. The State submits, however, that it was not unreasonable for the Georgia Supreme Court to conclude that Petitioner should not receive the benefits of *Batson* where he voiced no objection to the prosecutor's actual use of peremptory strikes at Petitioner's trial. Petitioner never stated that his pretrial anticipation had become a reality. The State submits that under these facts, the decision of the Georgia Supreme Court applying a procedural bar constitutes both an independent and an adequate state ground.

Both the Georgia Unified Appeal Procedure and the 1982 habeas corpus amendment gave sufficient notice to defense counsel in a 1984 Georgia death penalty trial of the need to raise timely objections. The fact that *Batson* had not yet been decided and the fact that the Georgia Supreme Court had not had the opportunity to delineate

specifically for defense counsel how to preserve a *Batson* claim should not excuse Petitioner's failure to have objected to the prosecutor's use of strikes at Petitioner's own trial. The State submits that such an objection is inherent in a *Batson* claim as *Batson* rests upon the prosecutor's actual use of strikes. Petitioner's total lack of objection is the basis upon which the Georgia Supreme Court applied the procedural bar, not Petitioner's lack of a timely objection.

Unlike *Swain* which required a showing of a pattern of systematic exclusion on the part of the prosecutor and where one case was generally viewed as insufficient to establish a violation, the *Batson* claim does not occur until the prosecutor has used his or her strikes in the individual defendant's trial. The State submits that inherent in a *Batson* challenge is a relatively timely assertion that the defendant is dissatisfied with the manner in which the prosecutor used those strikes. The Georgia Supreme Court here did not rely upon the defendant's failure to recite any talismanic words or phrases to conclude Petitioner was barred from proceeding on his *Batson* claim. Rather, even a simple oral motion for mistrial in the *Sparks* case was sufficient to preserve a *Batson* claim. *Sparks*, 257 Ga. at 98.

It is important to note that Petitioner did not cite *Swain* in his pretrial motion seeking to restrict the prosecutor's use of peremptory strikes. (Record 49-50; JA 4). Instead, Petitioner relied upon *McCray v. New York*, 461 U.S. 961 (1983) and *Taylor v. Louisiana*, 419 U.S. 522 (1975), Sixth Amendment fair cross-section cases. *Id.*

Justice Marshall in his dissent in *McCray* observed, "The desired interaction of a cross-section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn by the issues." *McCray*, 461 U.S. at 968. Justice Marshall also discussed how, "In California, for example, a defendant must make a timely objection and show from all the circumstances a strong likelihood that the prosecution is exercising its peremptory challenges because of race alone." *McCray*, 461 U.S. at 969. The California procedure empowered the trial court to require the prosecutor to show "some non-racial basis for the exercise of its challenges" and the trial court thereafter determined "whether the defendant has successfully demonstrated that the prosecution is using its peremptory challenges in a constitutionally impermissible manner." *Id.*

The crux of the issue in this case is whether it was reasonable for the Georgia Supreme Court to have required Petitioner to have made an objection to the jury selected in his case after the prosecutor had utilized his ten peremptory challenges, particularly where *Batson* had not yet been announced. The pertinent point is that Petitioner never objected to the manner in which the prosecutor actually utilized his strikes. Rather, Petitioner had simply filed a pretrial "anticipatory" motion but, as previously noted, never voiced any dissatisfaction with the jury actually selected in this case or with the prosecutor's actual use of his strikes. Petitioner's silence should be deemed acquiescence or satisfaction with the jury selected in this case. But for the actions of the trial court, the racial composition of this jury would not have even been placed in the record. Further, new counsel entered

the case at the motion for new trial level, and it was new counsel, not trial counsel, who specifically reasserted the pretrial motion regarding the prosecutor's use of challenges. Under these facts, where Petitioner voiced no dissatisfaction at trial through some sort of objection, motion or other form, the Georgia Supreme Court properly concluded that Petitioner had not preserved a challenge to the manner in which the prosecutor used this peremptory strikes at Petitioner's trial. Thus, the Georgia Supreme Court's refusal to consider the merits of the *Batson* claim was based upon an independent and adequate state ground.

CONCLUSION

For all of the above and foregoing reasons, the convictions and sentences of Petitioner should be affirmed and this Court should affirm the decision of the Supreme Court of Georgia.

Respectfully submitted,

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